No. 97-1390-CFX Title: Republic of Paraguay, et al., Petitioners
v.
James S. Gilmore, III, Governor of Virginia, et al.

Docketed: February 24, 1998 Court: United States Court of Appeals for the Fourth Circuit

See also:
97-8214

Entry	Date	Proceedings and Orders
	Feb 24 1998	Petition for writ of certiorari filed. (Response due March 26, 1998)
	Mar 26 1998	Brief amici curiae of Human Rights Committee, et al. filed.
	Mar 26 1998	Brief amici curiae of Republic of Argentina, et al. filed.
	Mar 30 1998	Waiver of right of respondents James S. Gilmore III, Governor to respond filed.
	Apr 1 1998	Application (A97-738) for a stay or injunction against execution of Angel Breard pending the disposition of petition for writ of certiorari, submitted to The Chief Justice.
	Apr 1 1998	Response to application (A97-738) filed by Gilmore, Governor of Virginia.
	Apr 3 1998	(A97-738) Reply in Support of Application for Stay of or Injunction filed by the Republic of Paraguay
	Apr 6 1998	Letter of petitioner filed.
	Apr 6 1998	Petitioner lodged two documents which were submitted to the International Court of Justice
	Apr 7 1998	Application (A97-738) referred to the Court by the Chief Justice.
	Apr 8 1998	The Solicitor General is invited to file a brief in this case expressing the views of the United States on or before 5 p.m., Monday, April 13, 1998
	Apr 13 1998	(A97-738) Supplemental Brief in Support of Application for a stay of Execution
	Apr 13 1998	(A97-738) Respondent's supplemental opposition
	Apr 13 1998	Brief for the United States as amicus curiae filed.
	Apr 13 1998	Motion and brief of amicus curiae in support of petitioner by the association of the Bar of the City of New York LODGED
	Apr 13 1998	(A97-738) Motion for leave to file statement amicus curiae of International law professors in support of petitioners' supplemental application for stay of or injunction against execution LODGED
	Apr 14 1998	Brief of petitioner In Reply to the Brief for the United States as Amicus Curiae filed.
	Apr 14 1998	Application (A97-738) denied by the Court. Opinion per curiam. Justice Stevens and Justice Breyer dissent.
	Apr 14 1998	Petition DENIED. Opinion per curiam.

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Supreme Court, U.S.
FILED

No. 97- 971390 FEB 24 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,

Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether article 36 of the Vienna Convention on Consular Relations and a similar provision in another United States treaty impose a continuing obligation on state law enforcement officials to permit meaningful assistance by foreign consular officers to a detained foreign national at all stages of criminal proceedings, or whether the state officials' outstanding obligations under the treaties are satisfied if, after arresting, trying, convicting and sentencing to death the national without permitting any consular assistance, the state officials allow foreign consular officers to meet with the national while he awaits execution?

2. Whether the doctrine of *Ex parte Young* authorizes a plaintiff to sue to enjoin the continuing consequences of a violation of federal law where (1) the state officials ceased to violate that law prior to the time suit was filed and (2) the injunction sought would have the effect of undoing the illegal conduct by protecting the plaintiff against the consequences of that conduct?

LIST OF PARTIES

Petitioners:

The Republic of Paraguay
Jorge J. Prieto, Ambassador of the Republic of Paraguay to the United States
José María Gonzalez Avila, Consul General of the Republic of Paraguay to the United States

Respondents:

James S. Gilmore III, Governor of the Commonwealth of Virginia
Mark L. Early, Attorney General for the Commonwealth of Virginia
David A. Garraghty, Warden, Greensville Correctional Facility, Jarratt, Virginia
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Paul F. Sheridan, Judge for the Circuit Court of Arlington County, Virginia
Benjamin N.A. Kendrick, Judge for the Circuit Court of Arlington County
William Newman, Jr., Judge for the Circuit Court of Arlington County
William L. Winston, Judge for the Circuit Court of Arlington County
Richard E. Trodden, Commonwealth's Attorney for the County of Arlington
Edward Flynn, Chief of Police of Arlington County
Ronald J. Angelone, Director of Corrections for the Commonwealth of Virginia.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-____

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners the Republic of Paraguay, its Ambassador Jorge J. Prieto, and its Consul General José María Gonzalez Avila (collectively, "Paraguay") respectfully request that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on January 22, 1998, affirming the District Court's order dismissing Paraguay's action for want of jurisdiction under the Eleventh Amendment to the Constitution of the United States.

Paraguay brings this action to enforce its rights under two treaties of the United States: the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ("the Vienna Convention"), and the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S. -Para., 12 Stat. 1091 (the "Friendship Treaty") (together, the "Treaties"). The Treaties provide Paraguay with the right (1) to receive prompt notification when a Paraguayan national is detained in the United States; (2) to have detained Paraguayan nationals notified directly of their right to consular

assistance; and (3) to have the opportunity actually to provide consular assistance to detained Paraguayan nationals prior to and during the course of criminal proceedings brought against them in the United States.

Notwithstanding these treaty rights, Virginia officials did not notify Paraguay when they arrested Angel Breard, a Paraguayan national, in 1992, and they did not apprise Breard of his right to contact the Paraguayan consul. As a result, Paraguay did not learn of Breard's arrest until *after* he had been tried, convicted, and sentenced to death, and had exhausted all appeals and state habeas proceedings – in short, until a time when, unless a new trial was scheduled, it would be impossible for Paraguay to render him the consular assistance that it was entitled to provide under the Treaties.

Respondents are the Virginia officials with responsibility for carrying out Breard's conviction and sentence. They do not deny that Virginia authorities tried, convicted, and sentenced Breard without providing the notifications or permitting the consular assistance contemplated by the Treaties. They claim, however, that they are no longer in violation of the Treaties because they have allowed Paraguay access to Breard while he awaits execution. The Court of Appeals agreed, holding that Paraguay neither alleged an ongoing violation nor sought prospective relief and hence that, notwithstanding the *Ex parte Young* doctrine, the Eleventh Amendment rendered the District Court powerless to remedy the state officials' violation of federal law in the form of two treaties of the United States.

This Court should grant review and reverse. *First*, the Court of Appeals was able to hold that there was no ongoing violation only by erroneously construing the Vienna Convention and the Friendship Treaty to provide a mere right to access to a detained national, rather than a right to provide effective consular assistance to the national at all stages of the proceedings against him. That holding is dangerous

both to American citizens living and traveling abroad and to foreign nationals present in the United States.

The Vienna Convention is the cornerstone of international consular law and practice, and the United States, like many nations, depends upon its consular assistance provisions to fulfill its mission of protecting American nationals abroad. The United States can hardly expect foreign governments – including those unfriendly or authoritarian regimes whose compliance with the consular assistance provisions would be most important to this country's citizens and consuls abroad – to give the Convention a more generous interpretation when dealing with American citizens than have United States courts when addressing the claims of foreign sovereigns. The vigor of the Vienna Convention, like that of any multilateral or bilateral treaty, depends upon reciprocal enforcement.

Second, even accepting the Court of Appeals' erroneous understanding of the rights provided by the Treaties, its holding creates a substantial conflict among the Courts of Appeals as to the requirements that a plaintiff must meet in order to come within the component of the *Ex parte Young* doctrine that permits a federal court to remedy the continuing consequences of a past violation of federal law. No other Court of Appeals has held that a continuing-consequences plaintiff must demonstrate that the state officials are still engaged in the illegal conduct, or that the relief sought cannot have the effect of undoing the very consequences of the illegal conduct against which the plaintiff seeks protection. These requirements, which are contrary to the premises of the continuing-consequences doctrine, would effectively eliminate it. The Court should grant the writ to resolve this conflict on the reach of the *Ex parte Young* doctrine.

Finally, the Court should grant the writ because this action falls within a category of cases that the Constitution expressly directs this Court to consider. This is a "Case[] affecting . . . Consuls" within

this Court's original jurisdiction. Paraguay respectfully submits that the Court should presumptively review cases, such as this one, that are within the Court's original jurisdiction, but where, out of respect for the Court's essentially appellate nature, the party seeking review first instituted suit in the lower federal courts. Review is particularly appropriate here because it would accord with the Framers' purpose in empowering this Court and the lower federal courts to resolve disputes concerning foreign diplomats and treaties: to ensure enforcement of the United States' treaty obligations before any such dispute escalated to the international arena. If this Court does not make clear that federal law gives effect to the Vienna Convention, Paraguay will have little recourse other than to seek relief in the International Court of Justice, which has compulsory jurisdiction over disputes between the United States and Paraguay arising under the Convention pursuant to its Optional Protocol.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ___ F.3d ____ and reproduced herein at A1. The District Court's opinion is reported at 949 F. Supp. 1269 (E.D. Va. 1996) and reproduced herein at A13.

JURISDICTION

The Court of Appeals entered judgment on January 22, 1998. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. III, § 2, cl. 2; *id.* art. VI, cl. 2; Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 596 U.N.T.S. 261; Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., art. XII, 12 Stat. 1091; 42 U.S.C. § 1983. These provisions are reproduced herein at A35-A39.

STATEMENT OF THE CASE

A. The Treaty Obligations

In 1970, the United States and the Republic of Paraguay each entered into the Vienna Convention on Consular Relations. Both nations thereby agreed to ensure that each other's consular officials, as well as consular officials from other signatory nations, would enjoy the rights, privileges, and immunities specified in the Convention. *E.g.* A35-36. Under the Constitution, the Vienna Convention became part of the "supreme Law of the Land" and hence binding law in each of the United States. U.S. CONST. art. VI, cl. 2.

The Vienna Convention guarantees the right to provide meaningful consular assistance to detained nationals. The Convention protects this right by requiring law enforcement officials (1) to notify "without delay" the detained national of his right to consular assistance; (2) to notify "without delay" the detained national's consulate of the arrest, if the national so requests; and (3) to permit the consular officials to render whatever assistance they desire to the detained national from the date of arrest through the end of any criminal proceedings brought against him. Further, while the Convention provides that the right of consular assistance "shall be exercised in conformity" with local laws and regulations, it also provides that, notwithstanding the foregoing, such "laws and regulations must enable *full effect* to be given to the purposes for

which the rights accorded under this Article are intended." A35-A36 (emphasis supplied).

In 1860, the United States and the Republic of Paraguay entered into the Treaty of Friendship, Commerce and Navigation. A37. Article XII requires that consular officers of Paraguay be accorded "whatever privileges, exemptions, and immunities are or may be" granted by the United States to consular officers "of any other nation whatever." The United States subsequently granted to consular officers of other nations, including the United Kingdom and the Russian Federation, the privilege of receiving immediate and mandatory notification of the arrest or detention of one of their nationals by law enforcement authorities in the United States. *Id.* Under the Friendship Treaty, law enforcement authorities in the United States are therefore required to extend to Paraguayan consular officers the same privilege and immediately notify them when a Paraguayan citizen is arrested. *Id.*

B. Breard's Detention And The Failure to Notify.

On September 1, 1992, a Paraguayan citizen, Angel Francisco Breard, was arrested in Virginia by the Arlington County police department on suspicion of murder. A49. Although the arresting authorities knew that Breard was a Paraguayan national, they did not inform him of his right under the Vienna Convention to request consular assistance from Paraguay, and they did not inform Paraguay that Breard was in their custody. *Id.* Had Breard been notified of his rights, he would have instructed the authorities to notify Paraguay of his arrest. Similarly, had Paraguay been notified of Breard's arrest, it would have demanded immediate access to Breard, in order to assist him *prior to and during* his criminal proceedings. A49-A51. Because Paraguay did not learn of Breard's detention until the spring of 1996, Paraguay did not afford Breard any assistance prior to or during the proceedings brought against him. *E.g.*, A50. In the circumstances

of Breard's case, effective consular assistance would have, at a minimum, resulted in a non-capital sentence. A50-A51.

On June 24, 1993, Breard was convicted of murder and, two months later, sentenced to death. A51. Breard's direct appeals of the conviction and sentence were denied, as was his state petition for habeas corpus. *Id.* When Paraguay finally learned of Breard's situation, an execution date had already been set. Since that time, Paraguay has attempted to render him consular assistance. However, the timing is such that little meaningful can be done on his behalf. Thus, Virginia authorities continue to deny Paraguay the opportunity to provide Breard with effective consular assistance consistent with the Treaties. A35-A37.

C. The Proceedings Below.

On September 16, 1996, Paraguay filed its complaint in the United States District Court for the Eastern District of Virginia, alleging violations of the Treaties and, with respect to its Consul General, of 42 U.S.C. § 1983. Federal jurisdiction was based on 28 U.S.C. § 1331. A42. The complaint sought, among other relief, an injunction barring respondents from taking any future actions based on Breard's illegally obtained conviction and ordering them to afford Paraguay its rights under the Treaties in any future proceedings against Breard. In October 1996, respondents moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(1), 12(b)(6).

On November 27, 1996, the District Court (Hon. Richard L. Williams) entered a final order dismissing the action for lack of subject matter jurisdiction. The District Court held that, as a party to the Treaties, Paraguay had standing to sue for redress of the treaty

violations. A20.[1] The court held, however, that because Virginia officials permitted Paraguayan officials to meet with Breard on death row, they were not engaged in an "ongoing violation" of federal law necessary to remove the bar of the Eleventh Amendment and bring the case within the doctrine of *Ex parte Young*.[2]

Paraguay appealed, and, on January 22, 1998, the Court of Appeals affirmed. The court stated that it "share[d] the district court's expressed 'disenchantment' with the Commonwealth's conceded past violation of Paraguay's treaty rights," and it noted the "disturbing implications in that conduct for larger interests of the United States and its citizens." A11 & n.7. Nevertheless, holding that Paraguay had not alleged an ongoing violation and did not seek prospective relief so as to come within even the continuing-consequences

1. *See, e.g., Santovincenzo v. Egan*, 284 U.S. 30 (1931) (treaty claim by Italian consul originating in New York court to recover property of Italian national who died intestate); *Wildenhus's Case*, 120 U.S. 1, 17 (1887) ("[W]e see no reason why [the Belgian consul] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States."); *Glass v. The Sloop Betsey*, 3 U.S. (3 Dall.) 6 (1794) (United States courts had jurisdiction to hear case brought by French consul to determine rights in ship of various parties, including France and Sweden, under "the laws of nations and the treaties and laws of the United States."); *see also Argentina v. New York*, 250 N.E.2d 698 (N.Y. 1969) (suit to enforce consular rights under customary international law in which United States filed brief as *amicus curiae* in support of foreign sovereign plaintiff).

2. The District Court also held that it lacked subject matter jurisdiction under the *Rooker/Feldman* doctrine. A18-19 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). That holding, which the Court of Appeals did not address, A7 n.4, is squarely foreclosed by this Court's decision in *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994), in which the Court held that *Rooker/Feldman* does not apply where, as here, the federal plaintiff "was not a party in the state court" and thus "was in no position to ask [the Supreme Court] to review the state court's judgment."

component of the *Ex parte Young* doctrine, the Court of Appeals affirmed. A11-A12.[3]

On the same day, the Court of Appeals affirmed the District Court's order denying Breard's own petition for habeas corpus, holding that Breard had defaulted his treaty-based claim of lack of notice. *Breard v. Pruett*, __ F.3d. __ (4th Cir. Jan. 22, 1998) (reproduced herein at A23-34). On February 18, 1998, the Court of Appeals denied Breard's petition for rehearing and suggestion for rehearing en banc. Under Virginia law, an execution must now be set

3. In the Court of Appeals, the United States filed a brief in support of appellees to argue that, although a foreign sovereign could certainly sue to vindicate its legal rights generally, *see Pfizer, Inc. v. India*, 434 U.S. 308 (1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), a suit by a foreign sovereign on a treaty raised a nonjusticiable political question. *See* Brief of *Amicus Curiae* United States at 8-9, 11-23, *Paraguay v. Allen*, ___ F.3d ___ (4th Cir. 1998) (No. 96-2770). The position articulated by the United States conflicts with a long line of cases from this Court dating back to the beginning of the Republic, *see, e.g.*, cases cited at note 1, as well as with the United States' *amicus* support in 1969 of Argentina in an action brought in New York State courts to enforce consular rights under pre-Vienna Convention customary international law. *See* Brief of *Amicus Curiae* United States, *Argentina v. New York*, 250 N.E.2d 698 (N.Y. 1969). Nor does the United States' position find support in the modern political-question doctrine, because a decision by a federal court ordering state officials to comply with two treaties signed by the President and consented to by the Senate could not possibly encroach upon the powers allocated to the political branches on the federal level. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"). A group of international law scholars, consisting of Professors Abbott, Bederman, Bilder, Caron, D'Amato, Damrosch, Dodge, Field, Fitzpatrick, Guttman, Henkin, Koh, Lockwood, Riesenfeld, Schachter, Schwartz, Slaughter, Steinhardt, and Weissbrodt, filed a brief *amicus curiae* at the reply stage to oppose the United States' position. *See* Brief of *Amicus Curiae* Group of Law Professors, *Paraguay v. Allen*, ___ F.3d ___ (4th Cir. 1998) (No. 96-2770). The Court of Appeals did not decide the question of justiciability. A7 n.4.

for no more than seventy days from the date of Virginia's notice informing the sentencing court of the Court of Appeals' decision. *See* VA. CODE ANN. § 53.1-232.1. Paraguay expects this notice to be given shortly.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS' DECISION EVISCERATES A FEDERAL RIGHT CREATED BY A TREATY TO WHICH THE UNITED STATES ATTACHES THE HIGHEST IMPORTANCE.

Ratified by over 130 countries, the Vienna Convention is the cornerstone of international law on consular affairs. LUKE T. LEE, CONSULAR LAW AND PRACTICE 23-25 (2d ed. 1991). The Convention "is widely accepted as the standard of international practice of civilized nations, whether or not they are parties to the Convention." Department of State telegram 40298 to the United States Embassy in Damascus, February 21, 1975, *reproduced in* CONSULAR LAW AND PRACTICE 145.

One of the most important consular functions protected by the Vienna Convention is the right of consuls to provide assistance to detained nationals. Vienna Convention, art. 5. The Vienna Convention protects that right by obligating local authorities of signatories of the Convention, including the United States, to notify "without delay" a detained national of his right to request assistance from his nation's consul. The Convention requires the arresting authorities, upon the national's request, "without delay [to] inform the consular post . . . if . . . a national of that state is arrested . . . or detained in any other manner." Vienna Convention, art. 36(1)(b). Through its guarantee of free communication and access between

consular officers and detained nationals, including pre- and post-conviction visits to prison, arranging legal representation, and conversations and correspondence, the Vienna Convention makes possible a wide range of consular assistance at every stage of the criminal proceedings against the detained national. *Id.* arts. 36(1)(a), 36(1)(c).[4]

In the face of these requirements, the Court of Appeals held that respondent Virginia officials are not "presently violating claimants' ongoing rights." A10. The court acknowledged that neither Paraguay nor Breard had received the notifications required by the Vienna Convention. *See* A3-A4. It did not question Paraguay's well-pleaded allegations that, by having failed to provide those notifications, respondents barred Paraguay from rendering consular assistance at the time it most mattered – during the proceedings on the merits and state post-conviction proceedings. The court held instead that respondents were not continuing to violate Paraguay's rights because they now permitted Paraguay access to Breard on death row, at a time when Paraguay can do little more than offer its condolences to the condemned man. A9-A11; *accord United Mexican States v. Woods*,

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4. Similarly, by virtue of its most-favored-nation clause, the Friendship Treaty requires that a consular officer shall "immediately" be notified of a national's arrest and provided access to the national no more than four days after the arrest. *E.g.*, Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2)-(3) & §§ 1-2 of protocol, 19 U.S.T. 5018, 5027, 5039 (providing privileges of immediate notification and access to Soviet consuls), A38; *see* Friendship Treaty, art. XII (Paraguayan consuls entitled to privileges of most favored nation), A37; *see also Santovincenzo v. Egan*, 284 U.S. 30, 35-36 (1931) (under most-favored-nation clause such as that in Friendship Treaty, rights and privileges provided other consuls under other treaties inure to benefit of consul invoking clause). For the sake of brevity, this petition refers occasionally only to the Vienna Convention, but the same importance attaches to the consular notification provisions of the Friendship Treaty, and the same effective interpretation should be given to that treaty.

126 F.3d 1220, 1223 (9th Cir. 1997).[5] In other words, the court held that article 36 provides merely an ephemeral right of access to a detained national, not a right to provide the full range of consular assistance desired at a time when the assistance might have an impact.

The Court of Appeals' interpretation of the right provided by the Vienna Convention is as deeply "disturbing" as the underlying treaty violation. A11. The Vienna Convention makes clear that, more than mere *access*, article 36 is intended to guarantee effective consular *assistance* to a detained national, both during the substantive proceedings against him and afterwards. Access cannot be an end in itself; to the contrary, the right to visit, converse, correspond, and arrange for legal representation reflects the parties' intention to facilitate effective assistance to the detained national facing foreign criminal proceedings. *See* Vienna Convention, arts. 5(e), 36. As this Court has cautioned, "a treaty should generally be construe[d] . . . liberally to give effect to the purpose which animates it." *United States v. Stuart*, 489 U.S. 353, 368 (1989) (internal quotation omitted). Here, the Court of Appeals has construed the Convention in a way that diminishes its effect.

In this case, moreover, the Vienna Convention supplies its own requirement that domestic law preserve the effectiveness of the rights

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5. Mexico filed its complaint in *United Mexican States* on May 16, 1997. 126 F.3d at 1221. With the execution of Mexico's national then imminent, the district court dismissed the complaint three days later, citing the District Court in this case on both grounds of dismissal. The case was submitted to the Court of Appeals for the Ninth Circuit on June 3, 1997, after expedited briefing and without oral argument. The court affirmed on Eleventh Amendment grounds on October 7, 1997, and later denied a petition for rehearing. Paraguay expects that Mexico will file a petition for review of the *Woods* decision. The habeas proceeding of Mexico's national in *Woods* is presently before this Court on writ of certiorari to the same court. *See Martinez-Villareal v. Stewart*, 118 F.3d 628, 634-35 (9th Cir. 1997), *cert. granted*, 118 S. Ct. 294 (Oct. 14, 1997) (Nos. 97-80229, 97-80249). Oral argument has yet to be scheduled.

of consular assistance it grants. In ratifying the Vienna Convention, the signatory nations recognized that each of their legal systems was in some way unique and that procedures for enforcing the consular notification and assistance rights could vary from one state to another. *See* Vienna Convention, art. 36(2) (consular assistance rights "shall be exercised in conformity" with local laws and regulations). At the same time, however, the signatory nations agreed that the form of a given signatory's domestic laws and regulations would not prevail over the substance of the rights accorded by the Convention. Whatever the structure of its domestic law, a signatory's "laws and regulations must enable *full effect* to be given to the purposes for which the rights accorded under [article 36] are intended." *Id.* (emphasis supplied).[6]

Faithful to the purpose of the Vienna Convention, the United States has itself read the rights afforded by article 36 in a manner inconsistent with the holding of the Court of Appeals here. In its Memorial to the International Court of Justice in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, filed in response to the 1979 storming of the American Embassy there, the United States stated:

> a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must *at all times* remain open. Indeed, *such*

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6. Indeed, article 36(2) was adopted over an amendment proposed by the Soviet Union that would have permitted domestic law to impair the rights accorded in article 36 so long as it did not render them completely inoperative. U.N. GAOR, Conf. on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶ 2-9, UN Doc. A/CONF. 25/SR. 12, 17 April 1963, p. 1, *reprinted in* 1 OFF. REC. 40; *see id.* (statement by Mr. Khlestov, USSR) (stating that article 36(2) could "force States to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders").

> *communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations*. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

1980 I.C.J. Pleadings 174 (emphasis added and citations omitted).[7]

The clear intent of the Treaties' provisions for prompt notification and access is to provide consular officers the right to assist the national at a time and in a context where such assistance can be most useful to the national and most effective in the exercise of consular functions. In the context of a criminal proceeding, the time that counts is the period prior to and during trial. *See, e.g., McFarland v. Scott*, 512 U.S. 849, 859 (1994) ("A criminal trial is the 'main event' at which a defendant's rights are to be determined.").[8] Here, there is no dispute that Virginia authorities

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7. *See also* ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 161 (1973) (emphasis added) ("[s]erious problems in . . . regard [to Article 36] have been experienced by American consular officers in countries of Eastern Europe, where . . . detention of an individual for prolonged 'interrogation' prior to the filing of formal charges is officially sanctioned. During this period of days, weeks, or even months, authorities of the receiving state may decline to observe that State's obligation to make notification to consular officials of the sending State. *Clearly this type of procedure is not in keeping with either the letter or the spirit of the Vienna Convention.*").

8. The strictures imposed by federal law on the ability of a foreign national to seek habeas corpus relief for treaty violations make the Court of Appeals' interpretation of the signatories' rights even more troubling. In *Breard v. Pruett*, __ F.3d. __ (4th Cir. Jan. 22, 1998), an opinion rendered the same day as the decision Paraguay asks the Court to review, the Court of Appeals held that Breard was barred from bringing his Vienna Convention claim on habeas because he had defaulted the claim by failing to raise it on direct (continued...)

have never satisfied their obligation to permit Paraguay to render consular assistance during the substantive proceedings against Breard, the only time when such assistance could have been outcome-determinative. By holding that the provision of consular access *three years* after Breard's trial and conviction satisfied their obligations of prompt notification and access, the Court of Appeals departed from the unambiguous text and intent of the Treaties. In the most fundamental sense, so long as Virginia authorities continue to take steps to carry out a conviction and death sentence rendered without permitting Paraguay the notification and meaningful access to which it is entitled, they will continue to violate Paraguay's rights under the Treaties.

The United States considers that the obligations enumerated in article 36 of the Vienna Convention are "of the highest order and should not be dealt with lightly." ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 161 (1973). It is easy to understand why. As the United States advised the Court of Appeals, "[t]hese provisions are very important to the United States because they give significant protection to U.S. nationals when they reside or travel abroad." Brief of *Amicus Curiae* United States at 1, *Paraguay v. Allen*, ___ F.3d ___ (4th Cir. 1998) (No. 96-2770). In his opinion concurring in the *Breard* court's ruling, Judge Butzner, too, emphasized that the "freedom and safety [of American citizens abroad] are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." *Breard v. Pruett*, ___ F.3d ___, A34. Yet, as this

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8.(...continued)
appeal or in his state habeas proceedings. A30. In conjunction, the decisions of the Court of Appeals here and in *Breard* make it impossible to give *any* effect to article 36 of the Vienna Convention: though it is Virginia officials who violated the Convention by failing to provide the required notice, it is Paraguay and its national who now suffer the consequences, because, according to the Court of Appeals, it is too late for either to seek relief.

case demonstrates, there is ample reason to be concerned about the degree of compliance in this country with the obligations imposed by the Convention.[9]

This Court should grant the writ to correct the Court of Appeals' dangerously narrow interpretation of article 36 of the Vienna Convention and to confirm this country's commitment to an international obligation to which it vigorously holds other nations.

II.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH OTHERWISE UNIFORM DOCTRINE ON THE AUTHORITY OF A FEDERAL COURT UNDER *EX PARTE YOUNG* TO REMEDY THE CONTINUING CONSEQUENCES OF A PAST VIOLATION OF FEDERAL LAW.

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), permits a federal court to grant prospective relief against state officials when necessary to remedy an ongoing violation of federal law or the

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9. As the Court of Appeals noted in this case, Virginia appears to have repeatedly violated its obligations under article 36. A11 & n.7. Secondary sources confirm that those obligations are not well understood or respected by state law enforcement officials. The General Counsel to Texas Governor George W. Bush reportedly protested a request by the U.S. Department of State for information concerning possible violations of article 36 by Texas law enforcement officials on the ground that "the State of Texas is not a signatory to the Vienna Convention." Al Kamen, *Virtually Blushing*, THE WASHINGTON POST, June 23, 1997, at A17. A state prosecutor who oversaw capital murder proceedings against a Mexican national was reported to describe an assertion of rights under article 36 as "completely ridiculous" and to question whether such rights were enforceable as law: "I mean, what is the remedy? I suppose Mexico could declare war on us." Laura LaFay, *Court to Hear Appeal of Mexican National in Beach Murder Case*, THE VIRGINIA PILOT, April 9, 1997, at B5.

continuing consequences of a past violation. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974) (ongoing violation); *Milliken v. Bradley*, 433 U.S. 267, 288-290 (1977) (continuing consequences of past violation). Here Paraguay alleges, and respondent officials do not deny, that no Virginia official provided the notice or permitted the consular assistance required by the Treaties at any point during the three-year period during which Breard was arrested, charged with capital murder, tried, convicted, sentenced to death, denied relief on appeal, and denied relief on state habeas. A48-52, A3, A18. Faced with the approaching execution of a national to whom it had been thwarted from rendering effective consular assistance, Paraguay brought suit in the District Court for an order prohibiting the competent authorities from executing Breard or otherwise enforcing his conviction and enjoining them to afford Paraguay its treaty rights should Virginia retry him, as Paraguay expects it would.

The Court of Appeals held that Paraguay's suit did not come within the *Ex parte Young* doctrine because Paraguay did not allege an "ongoing violation" and did not seek "prospective relief." A8-A11. The Court therefore concluded that, notwithstanding its "'disenchantment'" with respondent officials' conduct and the "disturbing implications in that conduct for larger interests of the United States and its citizens," the federal courts had to stand by and allow the "conceded [violators] of Paraguay's treaty rights" to put its national to death. A11-12.

For the reasons explained in Part I above, the Court of Appeals' *Ex parte Young* holding rests on a fundamentally erroneous interpretation of the rights afforded by the Vienna Convention and the Friendship Treaty and hence the status of the violation alleged at the time Paraguay brought suit. But even assuming with the Court of Appeals that the treaty violation was not ongoing, this case warrants review for the separate and independent reason that the court's *Ex parte Young* holding cannot be squared with either this Court's decision in *Milliken* or the otherwise consistent understanding of the

Courts of Appeals as to the circumstances in which a federal court may afford relief from the continuing consequences of even completed illegal conduct.

In *Milliken*, this Court held that the Eleventh Amendment did not prevent the district court from acting to eradicate the present effects of previously segregated schools by ordering the state to pay half the funds necessary to implement a remedial education plan for the Detroit school system. 433 U.S. at 288-90. The Court explained that, because the remedial education program was "plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit," the termination of the illegal segregation did not bar the relief. *Id.* at 290; *see Papasan v. Allain*, 478 U.S. 265, 282 (1986).

Following *Milliken*, the Courts of Appeals have uniformly recognized that *Ex parte Young* authorizes the federal courts to order state officials to fund remedial education programs designed to eradicate the continuing adverse effects of prior segregation even after the illegal segregation has ended;[10] to order state officials to reinstate illegally terminated state employees even when the firing of which they complain is past and completed such that retrospective relief in the form of lost wages is barred;[11] and to order state officials to fund

10. *See Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 713 (4th Cir. 1996); *Parents for Quality Educ. with Integration, Inc. v. Indiana*, 977 F.2d 1207, 1210-11 (7th Cir. 1992).

11. *See Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir.), *cert. denied*, 498 U.S. 813 (1990); *Melo v. Hafer*, 912 F.2d 628, 635-37 (3d Cir. 1990), *aff'd on other grounds*, 502 U.S. 21 (1991); *Coakley v. Welch*, 877 F.2d 304, 306-07 & n.2 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989); *Williams v. Kentucky*, 24 F.3d 1526, 1543-44 (6th Cir. 1994), *cert. denied*, 513 U.S. 947 (1985); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986); *Barnes v. Bosley*, 828 F.2d 1253, 1257-58 (8th Cir. 1987); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 837 (9th Cir. 1997); *Ramirez v.* (continued...)

remedial measures designed to remedy the continuing adverse effects of an illegal psychiatric confinement even after the confinement has ended.[12]

The Court of Appeals departed from the previously uniform understanding of the continuing-consequences doctrine by reading two requirements into that doctrine. *First*, the court held that the doctrine requires the plaintiff to show that the defendants are "in violation of federal law at the precise moment when the case was filed." A10. Neither this Court in *Milliken* nor any of the other Courts of Appeals, however, have imposed any such requirement. To the contrary, the premise of the doctrine is that, although the violation has ended, its consequences persist. For example, in *Milliken* and the other desegregation cases, the illegal segregation had ended, but its educational consequences continued; in the reinstatement cases, the illegal firing had already taken place, but its consequences in the form of the plaintiff's unemployment continued; and in the psychiatric confinement cases, the illegal confinement had ended, but its mental-health consequences continued. In none of those cases did the fact that the state officials had terminated their illegal activity prevent the federal court from requiring the officials to take affirmative steps to remedy the consequences of their actions.[13] As the Court of Appeals

11.(...continued)
Oklahoma Dep't of Mental Health, 41 F.3d 584, 589 (10th Cir. 1994); *Cross v. Alabama Dep't of Mental Health and Mental Retard'n*, 49 F.3d 1490, 1503 (11th Cir. 1995).

12. *Clark v. Cohen*, 794 F.2d 79, 84 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986); *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990).

13. In *United Mexican States v. Woods*, the court held, erroneously in Paraguay's view, that the Eleventh Amendment barred Mexico's similar action, *see* note 5 above, but did not cite *Milliken* or expressly consider the continuing-consequences doctrine. 126 F.3d at 1222-24. To the extent the (continued...)

for the Second Circuit explained in words that could have been addressed to the Court of Appeals here:

> We do not agree . . . that the existence of a past harm renders an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially undermined because the need for prospective relief often arises out of a past injury.

Russell, 896 F.2d at 668.

Second, the Court of Appeals held that Paraguay did not seek prospective relief, and the continuing-consequences doctrine did not apply, because, whether that relief was characterized as the voiding of a conviction and sentence or a prospective injunction against enforcement of that conviction and sentence, it remained "the inescapable fact that its effect would be to undo accomplished state action." A11. This Court and the other Courts of Appeals do not agree, however, that a continuing-consequences plaintiff must show that the relief sought would not "undo accomplished state action." To the contrary, the very premise of the doctrine is that the plaintiff has alleged illegal state action whose consequences can and should be "undone." The purpose of the relief provided in *Milliken* and the other desegregation cases was to undo, to the extent possible, the present effects of the prior illegal segregation; of that provided in the reinstatement cases to undo, to the extent possible, the present effects of the prior illegal firing; and of that provided in the mental health cases to undo, to the extent possible, the present effects of the prior illegal confinement. As the Court of Appeals for the Third Circuit put it in a psychiatric confinement case, "federal court[s] may order state

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13.(...continued)
decision rejects the doctrine, or imposes the requirements to which Paraguay objects, it exacerbates the conflict and reinforces the need to review the Court of Appeals' decision in this case.

officials to fund from the state treasury remedial measures found necessary to undo the harmful effects" of the prior illegal conduct. *Clark*, 794 F.2d at 84.

So too here, the federal court has the authority to undo, to the extent possible, the present and future effects of the "conceded past violation" by Virginia officials of Paraguay's rights under the Vienna Convention and the Friendship Treaty during the proceedings by which Breard was convicted and sentenced to death. The District Court can protect Paraguay from the prospective consequences of the violation by enjoining Virginia officials from seeking in the future to enforce the results of the prior proceedings and ordering them to permit Paraguay to render effective consular assistance in any future proceedings. Absent that authority, the continuing-consequences doctrine has no meaning.

In short, the continuing-consequences doctrine establishes that Paraguay is not asking for "quintessentially retrospective" relief prohibited by the Eleventh Amendment when it asks a federal court to prohibit Virginia officials from going forward with Breard's execution or enforcing his illegally obtained conviction. A11. The doctrine of *Ex parte Young* has has been described as "indispensable to the establishment of a constitutional government and the rule of law." CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 312 (5th ed. 1994). Because the two requirements engrafted by the Court of Appeals onto that doctrine represent a basic departure from the rule set down by this Court and followed by every other Court of Appeals, this Court should grant the petition.

III.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE CONSTITUTION'S FRAMERS INTENDED THIS COURT TO RESOLVE TREATY DISPUTES SUCH AS THIS ONE BEFORE THEY REACHED THE INTERNATIONAL PLANE.

Though Paraguay chose to file in the first instance in the District Court, this action falls within this Court's original jurisdiction. Though Paraguay chose to seek relief in the first instance from a court of the United States, the underlying dispute with the United States over the failure of Virginia officials to comply with their Vienna Convention obligations lies within the compulsory jurisdiction of the International Court of Justice.

Those special circumstances would make this case worthy of a writ even if the Vienna Convention and *Ex parte Young* issues identified in Parts I and II above did not independently warrant review. *First*, Paraguay respectfully submits that the Court should presumptively review cases, such as this one, that are within the Court's original jurisdiction, but where, out of respect for the Court's essentially appellate nature, the party seeking review first instituted suit in a district court. *Second*, review should be granted because this case accords precisely with the Framers' purpose in empowering this Court in particular and the federal courts in general to resolve disputes involving foreign diplomats and duties owed to foreign sovereigns: to ensure enforcement of the United States' international obligations before the dispute escalated to the international plane.

A. The Court Should Presumptively Review Cases Within Its Original Jurisdiction That Arrive Here On Certiorari.

Because Paraguay bases its action on consular conventions and seeks to protect consular functions, the case falls within the Court's original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls." U.S. CONST. art. III, § 2, cl. 2. Congress has determined, however, that the Court's original jurisdiction over such actions does not exclude that of the lower federal courts. 28 U.S.C. § 1251(b)(1). Mindful of this Court's busy appellate docket and stated preference against acting as trier of fact in the first instance, Paraguay instituted suit in the district court. *See, e.g., Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 496-99 (1971) (recognizing "time-honored" maxim that courts possessing jurisdiction generally must exercise it, but holding that modern role of Court as principally appellate court "ill-equipped for the task of factfinding" favors hearing of original-jurisdiction cases in lower courts in first instance).

Paraguay's decision to respect the Court's self-described limitations as an original tribunal does not diminish the importance the Constitution attaches to cases falling within the grant of original jurisdiction. Hence, to fulfill the constitutional mandate, the Court should stand ready to exercise its appellate jurisdiction to review substantial issues of law arising in cases that would fall within its original jurisdiction.[14] The guidelines this Court has set down for the exercise of its concurrent original jurisdiction indicate that the Court

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14. Unsurprisingly, this Court has repeatedly undertaken to review lower court decisions in cases that would otherwise have been within its original jurisdiction. *See, e.g., Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979) (exercising appellate jurisdiction to review issues Court had earlier declined to try under its original jurisdiction in *Arizona v. New Mexico*, 425 U.S. 794 (1976)); *Montana v. United States*, 450 U.S. 544 (1981); *United States v. Vermont*, 377 U.S. 351 (1964); *United States v. California*, 297 U.S. 175 (1936); *United States v. Louisiana*, 123 U.S. 32 (1887).

should grant the writ in cases within that jurisdiction arriving here on a petition for certiorari unless the legal issues presented are routine or based upon a particularly fact-intensive analysis. In *Wyandotte*, the Court held that it can decline to exercise its concurrent original jurisdiction

> only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to . . . its other responsibilities.

401 U.S. at 499.

Applying those guidelines, the Court should grant the writ here. *First*, because the case arrives in this Court in the posture of an appeal from a motion to dismiss and hence on a set of facts assumed to be true, the case presents no difficulties of factfinding and calls into play the Court's competence as "an appellate tribunal." *Id.* at 498. For the reasons set forth in Parts I and II above, this petition presents issues "of federal law and national import as to which [the Court is] the primary overseer[]." *Id.* *Second*, this case, grounded as it is on the failure of state officials to respect treaty obligations owed by the United States to a foreign sovereign, falls within a category of cases that the Constitution's Framers specifically intended the federal courts in general, and this Court in particular, to decide. For the reasons set forth in the next section, a denial of the writ in this case would clearly "disserve . . . the principal policies underlying the Article III jurisdictional grant," *id.* at 499, over "Cases affecting . . . Consuls." U.S. CONST. art. III, § 2, cl. 2.

B. The Court Should Grant The Writ Because The Framers Intended This Court To Resolve Cases Involving Consular Functions Where The Grant Of Relief Might Avoid An International Dispute.

An important motivation for the Framers' decision to establish a new government under a new Constitution was the inability of the central government under the Articles of Confederation to secure compliance by the states with the nation's obligations under international law. In reviewing the "evils" of the Articles of Confederation in order to assess an alternative, James Madison first asked:

> Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been shewn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does (not) sufficiently provide against this evil.

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (Max Farrand rev. ed. 1966).[15]

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15. *See also id.* at 19 (in the Confederation, Congress "could not cause infractions of treaties or of the law of nations, to be punished") (statement of Edmund Randolph reported by James Madison); *id.* at 164 ("foreign treaties [had not] escaped repeated violations") (statement of Charles Pinckney reported by Madison); *id.* at 24-25 ("If a State acts against a foreign power contrary to the laws of nations or violates a treaty, [the (continued...)

The Framers adopted a twofold solution. *First*, by the Supremacy Clause, they expressly made "all Treaties . . . the supreme Law of the Land" and hence binding on "the Judges in every State . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. *Second*, the Framers designated the judiciary the principal line of enforcement for treaty rights, no less than statutes and the Constitution itself, and they defined the federal judicial power to parallel the Supremacy Clause in scope. Hence, under Article III, the federal judicial power extends "to all Cases, in Law and Equity, arising under . . . Treaties" of the United States; "to all Cases affecting Ambassadors, other public Ministers and Consuls;" and to "Controversies . . . between a State, or the Citizens thereof, and foreign States . . . ." *Id.* art. III, § 2, cl. 1; *see, e.g.*, 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 490 (Jonathan Elliot ed., 2d ed. 1881) ("[the provision for judicial power over cases arising under treaties], sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect") (statement of James Wilson).[16]

15.(...continued)
Confederation] cannot punish that State, or compel its obedience to the treaty.") (statement of Edmund Randolph reported by James McHenry); *id.* at 164 ("Experience had evinced a constant tendency in the States . . . to violate national Treaties . . . .") (statement of Madison).

16. *See also* THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import . . . must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL."); 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 249 (John P. Kaminski & Gaspare J. Saladino eds., 1984) ("The constitution . . . . excludes the (continued...)

Indeed, the Framers considered the federal judicial role so important in disputes potentially involving "the important and sometimes delicate nature of our relations and intercourse with foreign governments" that they provided for original jurisdiction in this Court over disputes concerning consuls and ambassadors. *Ex parte Gruber*, 269 U.S. 302, 303 (1925).[17] As one commentator has put it, by according treaties the status of supreme federal law and providing for a judicial sanction against treaty violations, the Framers "contemplated that the judiciary would provide such a sanction and thus prevent or remedy any violation before it escalated to the international arena." Vázquez, n.16 above, at 1110.

This case presents precisely the situation the Framers anticipated: if this Court lets stand the Court of Appeals' decision that the federal courts are powerless to remedy the uncontested treaty violations by Virginia state officials, this dispute could ripen from an internal dispute in which Paraguay sought to vindicate its rights under federal law into an international dispute in which Paraguay will hold

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16.(...continued)
idea of an armed force. The power, which is to enforce these Laws, is to be a legal power vested in proper magistrates. The force, which is to be employed, is the energy of Law; and this force is to operate only upon individuals, who fail in their duty to their country.") (statement of William Samuels Johnson). *See generally* Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1101-10 (1992) (constitutional history demonstrates that Supremacy Clause and judicial power over treaty questions reflected Framers' intent that federal courts remedy treaty violations before they could develop into an international incident).

17. *See also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *id.* NO. 81 at 487 ("Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation").

the United States responsible for its courts' failure to remedy the actions of Virginia officials. Under the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, art. I, 21 U.S.T. 326, the International Court of Justice has compulsory jurisdiction over disputes concerning the interpretation or application of the Convention. Thus, based on the violation here, Paraguay has the right to seek relief against the United States in the International Court of Justice. Like Paraguay, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. CHARTER, art. 94(1). In addition, the International Court of Justice has the authority to order provisional measures to maintain the status quo pending consideration of Paraguay's application. Statute of I.C.J., June 26, 1945, art. 41, 59 Stat. 1055, 1061.

Notwithstanding the prospect of recourse to the International Court of Justice, Paraguay chose first to seek relief for the treaty violations from the federal courts of the United States, which held, in Paraguay's view erroneously, that they had no jurisdiction to provide relief. However, because the life of one of its nationals is at stake, if this Court does not grant review and reverse that result, Paraguay will have little choice but to seek relief from the International Court of Justice.[18]

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18. Though Paraguay expects that Breard will file his own petition for certiorari in this Court, the denial by the Court of Appeals of his petition for rehearing makes the setting of an execution date imminent. *See* Statement of the Case, Part C, above. To ensure that all available steps have been taken to vindicate its rights under the Vienna Convention, Paraguay may need to file an application in the International Court of Justice under the Optional Protocol, with, if necessary, a request for indication of provisional measures. Consistent with its conduct of this case throughout, however, Paraguay currently intends that it would seek a stay of that application and request for provisional measures if it were to obtain review in this Court and any injunctive relief necessary to prevent Breard's execution pending consideration of the merits. Paraguay would reserve the right to proceed (continued...)

The Framers did not intend for a dispute such as this one to reach the international level while there remained the prospect of recourse from the United States' own courts. The Constitution provides this Court with original jurisdiction over cases involving ambassadors and consuls, and the federal courts generally with jurisdiction over cases involving treaties, specifically to give the United States' own judicial authorities the opportunity to remedy violations of international law that might otherwise create an international dispute. This Court should not permit this case to move to the international plane unless and until it has itself determined that, as the Court of Appeals held, the federal courts do not have the authority to halt the execution by state authorities of a foreign national even where the national was convicted and sentenced in a proceeding that violated two treaties of the United States.

18.(...continued)
further in the International Court of Justice if at any point it thought it necessary to prevent Breard's execution or otherwise vindicate its Vienna Convention rights.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Dated: New York, New York
February 20, 1998

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,
Plaintiffs-Appellants,
v.
GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; Richard Cullen, Attorney General for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Honorable, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; ROBERT A. DREISCHER, Acting Chief of Police of Arlington County; RONALD J. ANGELINE, Director of Corrections for the Commonwealth of Virginia,
Defendants-Appellees.

No. 96-2770

UNION INTERNATIONALE DES AVOCATS; UNITED STATES OF AMERICA; FREDERICK M. ABBOTT; DAVID J. BEDERMAN; RICHARD B. BILDER; DAVID D. CARON; ANTHONY D'AMATO; LORI FISLER DAMROSCH; WILLIAM DODGE; MARTHA A. FIELD; JOAN M. FITZPATRICK; EGON GUTTMAN; LOUIS HENKIN; HAROLD HONGJU KOH; BURT LOCKWOOD; STEFAN A. RIESENFELD; OSCAR SCHACHTER; HERMAN SCHWARTZ; ANNE-MARIE SLAUGHTER; RALPH GUSTAV STEINHARDT; DAVID WEISSBRODT,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-96-745-R)

Argued: June 4, 1997
Decided: January 22, 1998

Before WIDENER and MURNAGHAN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Affirmed by published opinion. Senior Judge Phillips wrote the opinion, in which Judge Widener and Judge Murnaghan joined.

COUNSEL

ARGUED: DONALD FRANCIS DONOVAN, DEBEVOISE & PLIMPTON, New York, New York, for Appellants. DONALD RICHARD CURRY, Senior Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellees. DOUGLAS NEAL LETTER, Appellate Litigation Counsel, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amici Curiae.

ON BRIEF: BARTON LEGUM, MICHAEL M. OSTROVE, ALEXANDER A. YANOS, DEBEVOISE & PLIMPTON, New York, New York; LOREN KIEVE, DEBEVOISE & PLIMPTON, Washington, D.C.; RODNEY A. SMOLLA, LINDA A. MALONE, MARSHALL-WYTHE SCHOOL OF LAW, COLLEGE OF WILLIAM AND MARY, Williamsburg, Virginia; LESLIE M. KELLEHER, T.C. WILLIAMS SCHOOL OF LAW, UNIVERSITY OF RICHMOND, Richmond, Virginia, for Appellants. JAMES S. GILMORE, III, ATTORNEY GENERAL OF VIRGINIA, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia; ARA L. TRAMBLIAN, Deputy County Attorney, OFFICE OF THE COUNTY ATTORNEY, Arlington, Virginia, for Appellees. FRANK W. HUNGER, Assistant Attorney General, HELEN F. FAHEY, United States Attorney, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States. JOHN CARY SIMS, Sacramento, California; STEVEN A. HAMMOND, HUGHES, HUBBARD & REED, L.L.P., New

York, New York, for Amicus Curiae Union Internationale. DAVID J. BEDERMAN, Atlanta, Georgia, for Amici Curiae Law Professors.

OPINION

PHILLIPS, *Senior Circuit Judge:*

The Republic of Paraguay and its Ambassador and Consul General to the United States appeal from the district court's dismissal of their action seeking declaratory and injunctive relief against the Governor and other officials of the Commonwealth of Virginia (hereinafter "the Commonwealth" or "Commonwealth Officials"). Paraguay sought a declaration of violation by the Commonwealth of treaties between Paraguay and the United States, the vacatur of a capital conviction and death sentence imposed by the Commonwealth on a Paraguayan national in alleged violation of the treaties, and an injunction against further violations. The district court determined that it did not have subject matter jurisdiction over the case and dismissed it pursuant to Fed. R. Civ. P. 12(b)(1). We affirm.

I

Angel Francisco Breard was arrested on August 17, 1992, by the Arlington, Virginia police on suspicion of the murder of Ruth Dickie, who was killed in February 1992. Though Breard is a citizen of the Republic of Paraguay, the Arlington and Virginia authorities did not advise him of any right to contact the Paraguayan consulate to consult with it throughout his detention and trial. The Circuit Court of Arlington County did, however, appoint two attorneys to represent Breard.

On June 24, 1993, after a four-day trial, a jury convicted Breard of capital murder and attempted rape, and fixed punishment for the rape at ten years' imprisonment and a fine of $100,000. After a separate sentencing proceeding, the jury recommended that Breard be sentenced to death for the murder, and after an additional hearing on September 9, 1993, the state court entered a final judgment imposing the death penalty. The Virginia Supreme Court then affirmed Breard's conviction and sentence on direct review, *Breard v. Commonwealth*,

445 S.E.2d 670 (Va. 1994), and the United States Supreme Court denied certiorari. *See* 513 U.S. 971 (1994). At no point in his direct appeal did Breard allege that the Commonwealth had violated any treaty provision during the period of his detention and trial.

The circuit court then appointed new counsel to represent Breard in his state habeas corpus proceedings. In his state court petition Breard again failed to allege violations of any treaty. The circuit court dismissed Breard's petition in July 1995, and the Virginia Supreme Court refused his petition for appeal in January 1996. At some point after this date, Paraguay's ambassador and general consul became aware of Breard's conviction and sentence and sought to confer with Breard in accordance with international treaties providing that right. The Commonwealth acquiesced, and Paraguay's officers have been given free access to Breard since that time.

In August 1996, Breard filed a federal habeas corpus petition in the United States District Court for the Eastern District of Virginia in which he claimed that the Commonwealth had violated his rights under Article 36(1) of the Vienna Convention on Consular Relations ("Vienna Convention"), to which both Paraguay and the United States are signatories. That section provides:

> (b) [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
> (c) [C]onsular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers

> shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action. Vienna Convention on Consular Relations, Apr. 24, 1963, Art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261.

The district court dismissed Breard's petition on the ground of procedural default in failing to raise the treaty-violation claim at any point in the state court proceedings. *See Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) (citing *Gray v. Netherland*, 116 S. Ct. 2074, 2080-81 (1996)). Breard's appeal to this court from the dismissal of his petition is pending as of this writing.[1]

In September, 1996, the Republic of Paraguay, Jorge J. Prieto, its Ambassador to the United States, and Jose Antonio Dos Santos, its Consul General to the United States (collectively "Paraguay"), brought this action against the named Commonwealth officials alleging that Paraguay's separate rights under the earlier-quoted provisions of the Vienna Convention and those of another treaty requiring comparable notification, had been violated by the Commonwealth's failure to inform Breard of his rights under the treaties and to inform the Paraguayan consulate of Breard's arrest, conviction and sentence.[2]

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1 The district court's dismissal of Breard's petition was affirmed by this court in an opinion filed contemporaneously with that in this case. *See Breard v. Netherland*, ___ F.3d ___, No. 96-25 (4th Cir. Jan. 22, 1998).

2 The other treaty invoked is the Treaty of Friendship, Commerce, and Navigation ("Friendship Treaty") that was signed by the United States and Paraguay in 1859. Article XII of that Treaty provides that "the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever." Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., art. XII, 12 Stat. 1091. By later consular conventions the United States entered

(continued...)

The action included a joint claim based directly upon Paraguay's treaty rights and, for Dos Santos, a parallel claim under 42 U.S.C. § 1983 alleging denial of his rights under federal treaty law by the conduct of Commonwealth officials taken under color of state law.

In its claims, Paraguay sought as relief a declaration of treaty violation, a vacatur of Breard's conviction and sentence, and an injunction against further violations of the treaty provisions. The Commonwealth moved to dismiss the action under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on standing, subject matter jurisdiction, and merits grounds. The district court first determined that Paraguay and its officials had standing to bring their claims under the treaties, emphasizing that Paraguay was asserting its own rights and not those of Breard. *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (E.D. Va. 1996). The court also concluded that Dos Santos had standing to maintain his parallel § 1983 claim because he was a "person" within the meaning of the Act. *Id.* at 1275 (citing *United States v. Wong Kim Ark*, 169 U.S. 649, 678-81 (1898)).

The court ultimately decided, however, that it did not have subject matter jurisdiction because the claimants were not alleging a "continuing violation of federal law" and therefore could not bring their claims within the exception to Eleventh Amendment immunity

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2 (...continued)
into agreements with the United Kingdom, among other nations, under which "[a] consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district." Consular Convention, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426. *See also* Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12, 19 U.S.T. 5018 ("The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state."). Paraguay invokes this agreement with "any other" nation as entitling it to the same notification respecting confinement or custody of its nationals as was provided for the "other" nation.

established in *Ex parte Young*, 209 U.S. 123 (1908). 949 F. Supp. at 1273 (citing *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977)). Alternatively, the court held that it did not have "jurisdiction to review final decisions of a state court," and therefore could not order the vacatur of Breard's conviction and sentence obtained in Virginia's courts. 949 F. Supp. at 1273 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). The district court therefore dismissed the action. This appeal followed.

II

Paraguay challenges both of the grounds upon which the district court dismissed the action for lack of subject matter jurisdiction. The Commonwealth defends the dismissal on both grounds and also urges as an alternative basis for affirmance that the claims raise only non-justiciable "political questions."[3] We review *de novo* the district court's dismissal of the action for lack of subject matter jurisdiction. *See White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995) (citing *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994)).

Because we consider it dispositive of the appeal, we address only the Eleventh Amendment ground of the district court's dismissal of the action for lack of subject matter jurisdiction.[4] Though the basic Eleventh Amendment principles are settled and familiar, we summarize them here briefly. The Amendment imposes, in the form of sovereign immunity, "a constitutional limitation on the federal judicial power" over certain actions against unconsenting states of the

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3 The United States filed a brief and participated as amicus curiae in support of this position.

4 We do not, therefore, address the *Rooker-Feldman* basis for the district court's dismissal, nor do we consider the "political-question" issue first raised on this appeal. Though both are important issues, they are better reserved for cases in which their resolution is critical to decision.

Union. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Though the immunity thus provided runs literally only to actions by "Citizens of another state or by Citizens or Subjects of any foreign State," it has been judicially interpreted to run as well to actions by a state's own citizens, *Hans v. Louisiana*, 134 U.S. 1, 15 (1890), by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991), and, critically to this case, by foreign states, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934); *see also Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1129 (1996) (citing *Monaco* for principle).

The immunity extends not only to actions against States as named parties but to actions such as that here against state officials that are in fact actions against the state as the real party in interest. *See Pennhurst*, 465 U.S. at 101-02. Immunity in actions against state officials, is, however, subject to the critical exception announced in *Ex parte Young*, 209 U.S. 123 (1908), under which federal courts may exercise jurisdiction over claims against state officials by persons at risk of or suffering from violations by those officials of federally protected rights, if (1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective. *See id.* at 14950, *Green v. Mansour*, 474 U.S. 64, 68 (1985). This means that under the *Ex parte Young* exception, which is based upon the recognized fiction that the officials' conduct is not that of the state, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337 (1979).

Conversely, the exception does not permit federal courts to entertain claims seeking retrospective relief, either compensatory or other, for completed, not presently ongoing violations of federally-protected rights. *See Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (distinguishing for *Ex parte Young* purposes between retrospective and prospective relief).

The parties here join issue precisely on the questions whether the violations alleged by Paraguay are "ongoing" ones and whether the relief sought is only "prospective." We agree with the district court that the violation alleged here is not an ongoing one for *Ex parte*

Young purposes and, with the Commonwealth, that the essential relief sought is not prospective.[5]

Paraguay says the violation is "ongoing" or"continuing" in the sense that its "consequences" persist in Breard's continuation in custody under death sentence without benefit of the timely counseling that was prevented by the violation. The Commonwealth counters that there is no ongoing violation of *Paraguay*'s treaty rights, as distinguished from those of Breard, because Paraguay is presently on notice of Breard's situation and the Commonwealth is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires. The only "present consequences" being experienced from the past violation of treaty rights, says the Commonwealth, are any that Breard himself may be experiencing through lack of timely counseling, and these may, and have been, properly raised by Breard in his federal habeas corpus action.[6]

Paraguay seeks to avoid the obvious fact that the actual violation alleged is a past event that is not itself continuing by drawing on decisions allowing *Ex parte Young* suits which sought injunctive relief for what were considered to be ongoing consequences of past violations of federal rights. Specific reliance is placed on *Papasan v. Allain*, 478 U.S. 265 (1986), and *Milliken v. Bradley*, 433 U.S. 267 (1977), both of which allowed *Ex parte Young* actions for injunctive relief against what were considered to be the current, ongoing consequences of past violations.

Reliance on those decisions is misplaced; the situations presented in those cases are not analogous in critical respects to those presented

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5 The district court did not address, except to recognize it, the "prospective relief" issue; the Commonwealth has raised it both below and here.

6 Which is an action against a state official, the prison warden, that itself is maintainable in federal court only by virtue of the *Ex parte Young* exception, as specifically implemented by 28 U.S.C. § 2254. *See Seminole Tribe*, 116 S. Ct. at 1182 (Souter, J., dissenting) (noting the point).

by Paraguay's action. In *Papasan*, the action sought injunctive relief to compel equalizing funding of a school district which had been and continued to be under-funded in relation to other districts of the state as a result of the State's unconstitutional sale 100 years earlier of property held in trust for the district's support. In *Milliken*, the action sought injunctive relief to compel state officials to fund a remedial education plan in order to eradicate the demonstrably continuing effects of a long-maintained state policy of racial segregation in a public school system.

Both of those cases involve classic examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights. As the district court put it, the state-official defendants in *Milliken* "were in violation of federal law at the precise moment when the case was filed." *See* 949 F. Supp. at 1273. Here, by contrast, again as the district court indicated, Paraguay's claim was not, as it could not be, that Commonwealth officials were continuing to prevent Paraguay, either by action or non-action, from providing aid and counseling to Breard at the time Paraguay filed its action. *See id.*

For the same reason, Paraguay's reliance on this court's decisions in *Coakley v. Welch*, 877 F.2d 304 (4th Cir. 1989), and *Thomas S. by Brooks v. Flaherty*, 902 F.2d 250 (4th Cir. 1990), is misplaced. *Coakley* held that a state employee unconstitutionally discharged from his employment suffers a "continuing violation" of that property right that could be remedied by a federal injunctive decree requiring his reinstatement. *Thomas S.* held that persons subjected to unconstitutional treatment when formerly in state mental institutions suffered continuing violations of those constitutional rights after their release that could be remedied by a federal injunctive decree for their care. Again, those cases concerned classic claims of ongoing violations of federally-protected property and liberty rights. As in *Milliken* and *Papasan*, at the time that those actions were filed, responsible state officials were presently violating the claimants' ongoing rights. Nor is the relief sought by Paraguay for the treaty violations in any true sense "prospective." Paraguay bases its prospective-relief contention on the fact that the relief sought is formally couched in injunctive, declarative terms and on the basis, as

if it were dispositive of the question, that no monetary damages are sought. But when the essence is considered, the only presently effective relief sought for the violations claimed and conceded is quintessentially retrospective: the voiding of a final state conviction and sentence. That this could be effectuated in an injunctive or declaratory decree directed at state officials does not alter the inescapable fact that its effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation. Money damages are probably the purest and most recognizable form of retrospective relief, but surely not the only form, and the fact that that remedy is not sought whereas an injunctive or declarative form is, does not automatically establish that the *Ex parte Young* exception allows the action to proceed. *Cf. Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (holding that Indian Tribe's action to enjoin state officials from continuing to exercise jurisdiction over lands claimed by Tribe, being "functional equivalent" of quiet title action against state, was barred by Eleventh Amendment notwithstanding claimed violation was continuing and the relief sought was only prospective in form).

III

We share the district court's expressed "disenchantment" with the Commonwealth's conceded past violation of Paraguay's treaty rights. *See* 949 F. Supp. at 1273. There are disturbing implications in that conduct for larger interests of the United States and its citizens.[7] But, we conclude that because the violation of federal treaty law was not ongoing when this action was filed, nor the relief sought prospective, the Eleventh Amendment does not permit the federal courts to provide

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7 Made even more disturbing by the fact that this is not the only revealed violation. *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 26 (1997). The larger interests threatened are admirably pointed out by Senior Judge Butzner, specially concurring in *Breard v. Netherland*, ___ F.3d ___, ___, No. 96-25 (4th Cir. Jan. 22, 1998).

a remedy against the Commonwealth officials sued in this action for their conceded past violations. *See United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997) (holding to same effect in affirming dismissal on Eleventh Amendment immunity grounds of comparable action by Mexico and Mexican officials against Arizona officials).

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REPUBLIC OF PARAGUAY, *et al.*,
Plaintiffs,

v.

GEORGE ALLEN, GOVERNOR OF VIRGINIA, *et al.*,
Defendants.

Civil Action Number 3:96CV745

Nov. 27, 1996.

LOREN KIEVE, DEBEVOISE & PLIMPTON, Washington, DC, for *plaintiffs*.

DONALD RICHARD CURRY, OFFICE OF THE ATTORNEY GENERAL, Richmond, VA, for *defendants* ALLEN, GILMORE, ANGELONE, GARRAGHTY, NETHERLAND, SHERIDAN, KENDRICK, NEWMAN, WINSTON AND TRODDEN.

ARA LORIS TRAMBLIAN, Arlington, VA, for *defendant* STOVER.

MEMORANDUM OPINION

RICHARD L. WILLIAMS, Senior District Judge.

This matter is before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Proc. 12(b)(1). In the alternative, the defendants ask the Court to dismiss the action for failure to state a claim pursuant to Fed. R. Civ. Proc.

12(b)(6). For the reasons set forth below, the Court GRANTS the motion to dismiss for lack of subject matter jurisdiction.

I. *BACKGROUND*

This case arises from the arrest and conviction of Angel Breard. Mr. Breard is a dual citizen of Paraguay and Argentina. He came to the United States on a student visa in 1986. He has remained in this country since then. In 1993, a jury found Mr. Breard guilty of the rape and stabbing death of thirty-nine year old Ruth Dickie. The trial court sentenced him to death for these crimes. On August 30, 1996, Mr. Breard filed a petition for a writ of habeas corpus in this Court.

On September 12, 1996, the Republic of Paraguay, Jorge J. Prieto, Ambassador of the Republic of Paraguay to the United States and Jose Dos Santos, Consul General of the Republic of Paraguay to the United States, filed this action. Plaintiffs seek redress for alleged treaty violations stemming from Mr. Breard's arrest.

In 1970, the United States and the Republic of Paraguay entered into the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention"). Article 36(1) states that if an arrested foreign citizen so requests:

> (b) the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Paraguay and its officials argue that defendants, various officials representing the state of Virginia, failed to comply with this provision.

Plaintiffs also insist that the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty") grants similar privileges. The United States and Paraguay entered into this treaty on February 4, 1859. It is still in effect. Although the Friendship Treaty does not contain a notice provision similar to that in the Vienna Convention, it does contain a "most favored nation clause." Under Article XII of the Treaty, "the Diplomatic Agents and Consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever." Based on this clause, Plaintiffs contend that they are entitled to immediate and mandatory notification of the arrest of any Paraguayan national. The United States has extended this privilege to other nations in bilateral agreements. See, e.g., Convention Regarding Consular Officers, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426; Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2) & sec. 1 of protocol, 19 U.S.T. 5018; Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, sec. 5, 30 U.S.T. 17.

In addition, Mr. Dos Santos argues that defendants' inaction gives rise to a claim under 42 U.S.C. § 1983. Mr. Dos Santos is the Consul General of the Republic of Paraguay to the United States. In his official capacity, he has jurisdiction over the consular district encompassing the Commonwealth of Virginia.

Plaintiffs request several forms of declaratory and injunctive relief. In particular, they ask that this Court:

> 1. Declare that defendants violated the Vienna Convention and Friendship Treaty by failing to notify plaintiffs of Breard's arrest.

2. Declare that defendants continue to violate both treaties by failing to afford plaintiffs a meaningful opportunity to give Breard assistance during the proceedings against him.
3. Declare Breard's conviction void.
4. Enjoin defendants from taking any action based on the conviction and declare that any further action based on the conviction is a continuing violation of the treaties.
5. Grant an injunction vacating Breard's conviction and directing defendants to abide by the treaties during any future proceedings against Breard.

Defendants have filed a motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction. Defendants' arguments fall into two general categories: (1) that this Court does not have subject matter jurisdiction over the claims presented and (2) that the plaintiffs' claims are otherwise non-justiciable.

II. *SUBJECT MATTER JURISDICTION*

A. *ELEVENTH AMENDMENT IMMUNITY*

The Eleventh Amendment places constitutional limits on federal court subject matter jurisdiction. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). The text of the amendment divests this Court of jurisdiction over actions against a state by "Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. Const. Amend XI. This language was soon interpreted to prohibit other actions against a state in federal court. *See, e.g., Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890) (Eleventh Amendment bars suits against a state by one of its citizens); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781, 111 S. Ct. 2578, 2582, 115 L. Ed. 2d 686 (1991) (Eleventh Amendment bars suits against a state by an Indian Tribe). In particular, the Eleventh Amendment bars suits by a foreign government against a state government in federal court. *Seminole Tribe of Florida v. Florida*, --- U.S. ----, ---- - ----, 116 S. Ct. 1114,

1136-37, 134 L. Ed. 2d 252, 283 (1996); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 54 S. Ct. 745, 78 L. Ed. 1282 (1934).

The Eleventh Amendment also bars suits against state officials that are in fact suits against a state. *Pennhurst*, 465 U.S. at 101-02, 104 S. Ct. at 908-09. However, there is a narrowly crafted exception to this rule. A party at risk of or suffering from a violation of federally protected rights may seek to enjoin the offending state officers. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Before issuing an Ex parte Young type injunction, the plaintiffs must satisfy two criteria: (1) they must show that they seek a remedy for a continuing violation of federal law and (2) they must show that the relief is prospective. *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 425-26, 88 L. Ed. 2d 371 (1986).

Much of the debate over the doctrine of *Ex parte Young* has involved the second criterion. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989) (allowing award of attorney's fees as ancillary to the grant of prospective relief); *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (discussing the distinction between retroactive and prospective relief). Here, however, the Court must determine if Paraguay is the victim of a continuing violation of federal law. The Supreme Court has considered this issue on at least two occasions. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986); *Milliken v. Bradley*, 433 U.S. 267, 97 S. Ct. 2749, 53 L. Ed. 2d 745 (1977). In *Papasan*, the Court distinguished those cases properly reviewable under the doctrine of *Ex parte Young* from those that "stretch that case too far." "Young has been focused on cases in which a violation of federal law by a state is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." Id. at 277-78, 106 S. Ct. at 2940. For example, in *Milliken*, the defendants were perpetuating a system of de jure segregation. They were in violation of federal law at the precise moment when the case was filed.

That is not the case here. The complaint does not state that defendants continue to deny plaintiffs access to Breard. There is no allegation that defendants refuse to allow plaintiffs to give Mr. Breard legal assistance. In fact, officials from the Republic of Paraguay

assisted in the preparation of Breard's habeas petition filed before this Court. Now that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties.

Plaintiffs urge that but for Virginia's alleged violations of the treaties, Mr. Breard would not be on death row today. Assuming the validity of this assertion, it is a tragic consequence of Virginia's failure to abide by the law. Nonetheless, it is still a consequence of the violation and not a continuing wrong. Although this Court is disenchanted by Virginia's failure to embrace and abide by the principles embodied in the Vienna Convention and Friendship Treaty, the Eleventh Amendment operates to bar retroactive relief. *Papasan*, 478 U.S. at 278, 106 S. Ct. at 2940; *Cory v. White*, 457 U.S. 85, 90, 102 S. Ct. 2325, 2328-29, 72 L. Ed. 2d 694 (1982); *Edelman*, 415 U.S. at 666-69, 94 S. Ct. at 1357-59.

B. *DISTRICT COURT REVIEW OF STATE COURT PROCEEDINGS*

Federal district courts are courts of limited jurisdiction. With the exception of federal habeas review, district courts do not have jurisdiction to review final decisions of a state court. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841-42, 36 L. Ed. 2d 439 (1973). The Fourth Circuit has stated the precise limits of this Court's powers. "If the ... claims presented to a United States district court are inextricably intertwined with the merits of a state court judgment, then the district court is in essence being called upon to review the state-court decision. This the district court cannot do." *Leonard v. Suthard*, 927 F.2d 168, 169-70 (4th Cir. 1991) (internal citations and quotations omitted).

Yet, this is precisely what the plaintiffs request. They implore the Court to vacate Breard's conviction. Plaintiffs argue that this case is distinguishable from the cases above because this case is not an appeal. Paraguay and its officials do not request that the Court vacate Breard's sentence because of trial defects. Instead, plaintiffs are suing to vindicate their own rights under the treaties. Furthermore,

this is the first forum in which plaintiffs have sought relief. This is an accurate statement of the procedural posture of this case. Nevertheless, it does not vitiate the legal principles enunciated by the Supreme Court and the Fourth Circuit. Simply stated, this Court has no authority to disturb a state court ruling regardless of the procedural posture of the litigants. That power rests solely with the Supreme Court of the United States. *Feldman*, 460 U.S. at 476, 103 S. Ct. at 1311-12.

III. *JUSTICIABILITY*

A. *PARAGUAY'S STANDING UNDER THE TREATIES*

Defendants argue that Paraguay does not have standing. A plaintiff has standing to sue in federal court if: (1) the plaintiff has suffered an injury; (2) the defendants caused the injury; and (3) the injury is redressable by the Court. *Finlator, et al. v. Powers*, 902 F.2d 1158, 1160 (4th Cir. 1990). First, defendants insist that this Court has no power to redress the alleged treaty violations because the treaties do not provide a mechanism for litigation in federal court. Defendants have cited no authority for the proposition that the language of a treaty, or of any other contract, must set forth all applicable remedies. "Treaties are contracts between sovereigns." *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). They have the same force as federal law. *United States v. Alvarez-Machain*, 504 U.S. 655, 668, 112 S. Ct. 2188, 2195-96, 119 L. Ed. 2d 441 (1992). As a party to the treaties, Paraguay has standing to seek redress for violations. *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.) (treaties are "designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress"), cert. denied, 498 U.S. 878, 111 S. Ct. 209, 112 L. Ed. 2d 169 (1990). Absent any other limitations, this Court has the power to interpret the treaties and fashion an equitable remedy. *See, e.g., Tabion*, 73 F.3d 535 (4th Cir. 1996) (construing the Vienna Convention); *In re Grand Jury*, 817 F.2d 1108 (4th Cir. 1987) (same); *U.S. v. Chindawongse, et al*, 771 F.2d 840 (4th Cir. 1985) (same).

Similarly, defendants maintain that this Court may not enforce the treaties because they are not "self-executing." The term "self-executing" has two distinct meanings in international law. Committee of *U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988) (citations omitted). Most frequently, the term is used to refer to a treaty that does not require implementing legislation before becoming federal law. *Id.* The parties agree that the treaties are "self-executing" under this definition. However, the term "self-executing" also denotes a treaty that confers rights of action on private individuals. *Id.* Absent such language, a private party may not seek redress for treaty violations. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442, 109 S. Ct. 683, 692-93, 102 L. Ed. 2d 818 (1989) (Geneva Convention on High Seas does not provide rights to private persons); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir.) (Hague Convention on War on Land does not provide rights to private persons), cert. denied, 506 U.S. 955, 113 S. Ct. 411, 121 L. Ed. 2d 335 (1992). Defendants correctly note that the Vienna Convention and the Friendship Treaty are not "self-executing" in this sense. However, this observation has no bearing on the issues before this Court. Paraguay is not a private individual seeking enforcement of the treaty. It is an actual party to the contract and it has standing based on this status. *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("[u]nder international law, it is the contracting foreign government that has the right to complain about a violation"), cert. denied 480 U.S. 919, 107 S. Ct. 1377, 94 L. Ed. 2d 692 (1987).

Finally, defendants argue that this action is an impermissible attempt to assert third-party standing. A third-party may not assert the rights of another unless the third party demonstrates that the real party in interest is unable to litigate by virtue of "inaccessibility, mental incompetence, or other disability." *Whitmore v. Arkansas*, 495 U.S. 149, 163-64, 110 S. Ct. 1717, 1727-28, 109 L. Ed. 2d 135 (1990); *see also Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71, 113 L. Ed. 2d 411 (1991). Although Paraguay seeks relief that would also benefit Mr. Breard, it is not asserting Mr. Breard's rights. As indicated above, Paraguay is a signatory to the treaties. It is the real party in interest in this matter and it has

standing to seek redress. *Matta-Ballesteros*, 896 F.2d at 259; *Rosenthal*, 793 F.2d at 1232.

B. *MR. DOS SANTOS' STANDING UNDER § 1983*

Only Jose Dos Santos, Consul General of the Republic of Paraguay, has asserted a claim under § 1983. In their motion to dismiss, defendants assume that Mr. Dos Santos, a Paraguayan official, is not a "person" within the meaning of the statute. This assumption is erroneous. *See, e.g., United States v. Wong Kim Ark*, 169 U.S. 649, 678-81, 18 S. Ct. 456, 468-69, 42 L. Ed. 890 (1898) (consul is person "subject to the jurisdiction" of the United States); *see also, Plyler v. Doe*, 457 U.S. 202, 211-213, 102 S. Ct. 2382, 2391-93, 72 L. Ed. 2d 786 (1982) (explaining that the term "within the jurisdiction of the United States" encompasses all persons within the territorial jurisdiction of the United States). Mr. Dos Santos is a proper plaintiff. Thus, his cause of action is not susceptible to a motion to dismiss for failure to state a claim based on defendants' theory.

C. *APPROPRIATENESS OF DECLARATORY RELIEF*

In defendants' opinion, this case is moot because they are no longer violating the treaties. As of April 1996, plaintiffs have been granted unfettered access to Mr. Breard. This turn of events does not render the case moot. "Voluntary cessation of allegedly illegal conduct does not deprive [a] tribunal of the power to hear and determine [a] case." *Commonwealth of Virginia ex. rel. Coleman v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953)). In such cases, defendants have the burden of showing that they will not repeat the wrong. *Id.* Although defendants urge the Court to deny declaratory relief, they have not set forth one piece of

evidence to support their heavy burden.[8] Thus, absent any jurisdictional limitations, this case is suitable for declaratory relief.

IV. *CONCLUSION*

For the reasons stated above, this Court lacks subject matter jurisdiction over the issues presented. Accordingly, the Court GRANTS defendants' motion to dismiss.

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8 In fact, there is evidence that the Commonwealth has disregarded the Vienna Convention on at least one other occasion. *See, Murphy v. Netherland*, No. 3:95cv856, Memorandum Opinion at 6-8 (E.D.Va. July 26, 1996) (discussing Virginia's failure to notify Mexico when Mr. Murphy was detained, tried, and convicted).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGEL FRANCISCO BREARD,
Petitioner-Appellant,

v.

SAMUEL V. PRUETT, WARDEN,
MECKLENBURG CORRECTIONAL CENTER,
Respondent-Appellee.

THE HUMAN RIGHTS COMMITTEE OF
THE AMERICAN BRANCH OF THE
INTERNATIONAL LAW ASSOCIATION,
Amicus Curiae.

No. 96-25

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-96-366-3)

Argued: October 1, 1997
Decided: January 22, 1998

Before HAMILTON and WILLIAMS, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Hamilton wrote the opinion, in which Judge Williams joined. Senior Judge Butzner wrote a concurring opinion.

COUNSEL

ARGUED: WILLIAM GRAY BROADDUS, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia, for Appellant. DONALD RICHARD CURRY, *Senior Assistant Attorney General*, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

ON BRIEF: ALEXANDER H. SLAUGHTER, DOROTHY C. YOUNG, MCGUIRE, WOODS, BATTLE & BOOTHE, L.L.P., Richmond, Virginia; MICHELE J. BRACE, VIRGINIA CAPITAL REPRESENTATION RESOURCE CENTER, Richmond, Virginia, for Appellant. Jeffrey L. Bleich, San Francisco, California, for Amicus Curiae.

OPINION

HAMILTON, *Circuit Judge:*

Following a jury trial in the Circuit Court for Arlington County, Virginia, Angel Francisco Breard, a citizen of both Argentina and Paraguay, was convicted and sentenced to death for the murder of Ruth Dickie. He now appeals the district court's denial of his petition for writ of habeas corpus. *See* 28 U.S.C.§ 2254. We affirm.

I

In February 1992, Ruth Dickie resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County, Virginia. At about 10:30 or 10:45 p.m. on February 17, 1992, Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, Isch called Joseph King, the maintenance person for the apartment complex. Upon arriving at Dickie's apartment, King knocked on the door and heard a noise that sounded like someone was being dragged across the floor. After receiving no response to his knocking, King called the police.

When the police arrived, they entered Dickie's apartment with a master key that King provided. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread. She was bleeding and did not appear to be breathing. The police observed body fluid on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. A telephone receiver located near her head was covered with blood.

An autopsy revealed that Dickie had sustained five stab wounds to the neck; two of which would have caused her death. Foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to hair samples taken from Breard. Hairs found clutched in Dickie's hands were Caucasian hairs microscopically similar to Dickie's own head hair and bore evidence that they had been pulled from her head by the roots. Semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects, and his DNA profile matched the DNA profile of the semen found on Dickie's body.

Breard was indicted on charges of attempted rape and capital murder. Following a jury trial, he was convicted of both charges. The jury fixed Breard's punishment for the attempted rape at ten years' imprisonment and a $100,000 fine. In the bifurcated proceeding, the jury heard evidence in aggravation and mitigation of the capital murder charge. Based upon findings of Breard's future dangerousness and the vileness of the crime, the jury fixed Breard's sentence at death. The trial court sentenced Breard in accordance with the jury's verdicts.

Breard appealed his convictions and sentences to the Supreme Court of Virginia, and that court affirmed. *See Breard v. Commonwealth*, 445 S.E.2d 670 (Va. 1994). On October 31, 1994, the United States Supreme Court denied Breard's petition for a writ of certiorari. *See Breard v. Virginia*, 513 U.S. 971 (1994).

On May 1, 1995, Breard sought state collateral relief in the Circuit Court for Arlington County by filing a petition for writ of habeas corpus. On June 29, 1995, the circuit court dismissed the petition. On

January 17, 1996, the Supreme Court of Virginia refused Breard's petition for appeal.

Breard then sought federal collateral relief in the United States District Court for the Eastern District of Virginia by filing a petition for writ of habeas corpus on August 30, 1996. On November 27, 1996, the district court denied relief. *See Breard v. Netherland*, 949 F. Supp. 3 1255 (E.D. Va. 1996). On December 24, 1996, Breard filed a timely notice of appeal. On April 7, 1997, the district court granted Breard's application for a certificate of appealability as to all issues raised by Breard in his application. *See* 28 U.S.C.§ 2253; Fed. R. App. P. 22.

II

A

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended, among other things, 28 U.S.C. § 2244 and §§ 2253-2255, which are parts of the Chapter 153 provisions that govern all habeas proceedings in federal courts. The AEDPA, which became effective on April 24, 1996, also created a new Chapter 154, applicable to habeas proceedings against a state in capital cases. The new Chapter 154 applies, however, only if a state "opts in" by establishing certain mechanisms for the appointment and compensation of competent counsel. In *Lindh v. Murphy*, 117 S. Ct. 2059 (1997), the Supreme Court held that § 107(c) of the AEDPA, which explicitly made new Chapter 154 applicable to cases pending on the effective date of the AEDPA, created a "negative implication . . . that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.* at 2068. Thus, under *Lindh*, if a habeas petition was filed before April 24, 1996, the pre-AEDPA habeas standards apply. *See Howard v. Moore*, 1997 WL 755428, at *1 (4th Cir. Dec. 9, 1997) (*en banc*) ("Howard filed his habeas petition in the district court prior to April 26, 1996, the effective date of the AEDPA. We, therefore, review Howard's claims under pre-AEDPA law." (Footnote omitted)). For habeas petitions filed after April 24, 1996, then, the Chapter 153 provisions apply, *see Murphy v. Netherland*,

116 F.3d 97, 99-100 & n.1 (4th Cir. 1997) (applying amended § 2253 in case where state prisoner filed federal habeas petition after the effective date of the AEDPA), and the Chapter 154 provisions apply if the state satisfies the "opt-in" provisions.

Breard filed his federal habeas petition on August 30, 1996. Accordingly, the Chapter 153 provisions apply. *See Howard*, 1997 WL 755428, at *1. With respect to the Chapter 154 provisions, the district court held that they did not apply because the Commonwealth of Virginia did not satisfy the "opt-in" provisions of the AEDPA. *See Breard v. Netherland*, 949 F. Supp. at 1262. Because the Commonwealth of Virginia has not appealed this ruling and the record is not developed on this point, we decline to address whether the Commonwealth of Virginia's mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfies the "opt-in" provisions of the AEDPA. *Cf. Bennett v. Angelone*, 92 F.3d 1336, 1342 (4th Cir.) (declining to decide whether the procedures established by the Commonwealth of Virginia for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel satisfy the "opt-in" requirements, which would render those provisions applicable to indigent Virginia prisoners seeking federal habeas relief from capital sentences if an initial state habeas petition was filed after July 1, 1992), *cert. denied*, 117 S. Ct. 503 (1996). However, we are confident that the "opt-in" provisions are of no help to Breard.

B

Initially, Breard contends that his convictions and sentences should be vacated because, at the time of his arrest, the Arlington County authorities failed to notify him that, as a foreign national, he had the right to contact the Consulate of Argentina or the Consulate of Paraguay pursuant to the Vienna Convention on Consular Relations, *see* 21 U.S.T. 77. The Commonwealth of Virginia argues that Breard did not raise his Vienna Convention claim in state court and thus failed to exhaust available state remedies. Furthermore, because Virginia law would now bar this claim, the Commonwealth of Virginia argues that Breard has procedurally defaulted this claim for

purposes of federal habeas review. The district court held that, because Breard had never raised this claim in state court, the claim was procedurally defaulted and that Breard failed to establish cause to excuse the default. *See Breard v. Netherland*, 949 F. Supp. at 1263. Breard's failure to raise this issue in state court brings into play the principles of exhaustion and procedural default.

In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal habeas relief. *See Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir.), *cert. denied*, 118 S. Ct. 102 (1997); *see also* 28 U.S.C. § 2254(b). To exhaust state remedies, a habeas petitioner must fairly present the substance of his claim to the state's highest court. *See Matthews*, 105 F.3d at 911. The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition. *See id.* The burden of proving that a claim is exhausted lies with the habeas petitioner. *See Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994).

A distinct but related limit on the scope of federal habeas review is the doctrine of procedural default. If a state court clearly and expressly bases its dismissal of a habeas petitioner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A procedural default also occurs when a habeas petitioner fails to exhaust available state remedies and "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* at 735 n.1.

Under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition." *Hoke v. Netherland*, 92 F.3d 1350, 1354 n.1 (4th Cir.) (internal quotes omitted), *cert. denied*, 117 S. Ct. 630 (1996); Va. Code Ann. § 8.01654(B)(2) ("No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner

had knowledge at the time of filing any previous petition."). Breard contends that he had no reasonable basis for raising his Vienna Convention claim until April 1996 when the Fifth Circuit decided *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.), *cert. denied*, 117 S. Ct. 487 (1996). In that case, the court held that an arrestee's rights under the Vienna Convention were violated when Texas officials failed to inform the arrestee of his right to contact the Canadian Consulate. *Id.* at 520. Breard further maintains that he could not have raised his Vienna Convention claim in his state habeas petition because the Commonwealth of Virginia failed to advise him of his rights under the Vienna Convention. These allegations, however, are inadequate to demonstrate that the facts upon which Breard bases his Vienna Convention claim were unavailable to him when he filed his state habeas petition.

In *Murphy*, we rejected a state habeas petitioner's contention that the novelty of a Vienna Convention claim and the state's failure to advise the petitioner of his rights under the Vienna Convention could constitute cause for the failure to raise the claim in state court. *See* 116 F.3d at 100. In reaching this conclusion, we noted that a reasonably diligent attorney would have discovered the applicability of the Vienna Convention to a foreign national defendant and that in previous cases claims under the Vienna Convention have been raised:

> The Vienna Convention, which is codified at 21 U.S.T. 77, has been in effect since 1969, and a reasonably diligent search by Murphy's counsel, who was retained shortly after Murphy's arrest and who represented Murphy throughout the state court proceedings, would have revealed the existence and applicability (if any) of the Vienna Convention. Treaties are one of the first sources that would be consulted by a reasonably diligent counsel representing a foreign national. Counsel in other cases, both before and since Murphy's state proceedings, apparently had and have had no difficulty whatsoever learning of the Convention. *See, e.g., Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996); *Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993); *Mami v. Van Zandt*, No. 89 Civ. 0554, 1989 WL 52308 (S.D.N.Y. May 9, 1989); *United States v. Rangel-Gonzales* , 617 F.2d 529, 530 (9th Cir. 1980); *United States v. Calderon-Medina*, 591

F.2d 529 (9th Cir. 1979); *United States v. Vega-Mejia*, 611 F.2d 751, 752 (9th Cir. 1979). *Id.*

Murphy forecloses any argument that Breard could not have raised his Vienna Convention claim at the time he filed his initial state habeas petition in May 1995. Accordingly, Breard's Vienna Convention claim would be procedurally defaulted if he attempted to raise it in state court at this time. Having reached this conclusion, we can only address Breard's defaulted Vienna Convention claim if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

In order to demonstrate "cause" for the default, Breard must establish "that some objective factor external to the defense impeded counsel's efforts" to raise the claim in state court at the appropriate time. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also Murphy*, 116 F.3d at 100 (applying *Murray* and finding that petitioner failed to establish cause to excuse the default of his Vienna Convention claim). For the same reasons discussed above, Breard asserts that the factual basis for his Vienna Convention claim was unavailable to him at the time he filed his state habeas petition and, therefore, he has established cause. But, under *Murphy*, Breard's showing is insufficient to allow this court to conclude that the factual basis for his Vienna Convention claim was unavailable. Consequently, there is no cause for the procedural default. Accordingly, we do not discuss the issue of prejudice. *See Kornahrens v. Evatt*, 66 F.3d 1350, 1359 (4th Cir. 1995) (noting that once court finds the absence of cause, court should not consider the issue of prejudice to avoid reaching alternative holdings), *cert. denied*, 116 S. Ct. 1575 (1996).

Finally, we find it unnecessary to address the issue of whether the AEDPA abrogated the "miscarriage of justice" exception to the procedural default doctrine. Assuming *arguendo* that the AEDPA has not eliminated the miscarriage of justice exception articulated in *Murray*, 477 U.S. at 495-96 (miscarriage of justice exception available to those who are actually innocent), and *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992) (miscarriage of justice exception available to those who are actually innocent of the death penalty, *i.e.*, those

habeas petitioners who prove by clear and convincing evidence that, but for the constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty), no miscarriage of justice occurred here. In no set of circumstances has Breard made a showing that he is actually innocent of the offense he committed, *see Murray*, 477 U.S. at 49596, or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty, *see Sawyer*, 505 U.S. at 350. Accordingly, Breard is entitled to no relief on his Vienna Convention claim.

C

Breard also contends that his death sentence violates *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny. In asserting this claim, Breard argues that: (1) given the prosecutor's alleged offer to forego the death penalty if Breard would plead guilty, the prosecutor violated his constitutional rights by seeking and obtaining a death sentence once Breard insisted upon pleading not guilty; (2) the Commonwealth of Virginia imposes the death penalty arbitrarily in capital murder cases; and (3) his death sentence is unconstitutionally disproportionate. The first two claims mentioned above were never raised in state court. The remaining claim was raised on direct appeal, but only as a state law claim, and on the appeal from the denial of state habeas relief the Virginia Supreme Court found this claim procedurally barred under the rule of *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974) (holding that issues not properly raised on direct appeal will not be considered on state collateral review). Because Breard has not established cause for the obvious procedural default of these claims or that a miscarriage of justice would result by our failure to consider any one of these claims, we cannot address the merits.

D

Finally, Breard argues that the aggravating circumstances instructions given by the trial court are unconstitutionally vague. This claim is not procedurally barred because the Supreme Court of

Virginia rejected it on direct appeal. *See Breard v. Commonwealth*, 445 S.E.2d at 675. In his brief, Breard concedes that we have upheld similar instructions in the recent cases of *Bennett*, 92 F.3d at 1345 (rejecting vagueness challenge to the Commonwealth of Virginia's vileness aggravating circumstance), and *Spencer v. Murray*, 5 F.3d 758, 76465 (4th Cir. 1993) (rejecting vagueness attack on the future dangerousness aggravator). Furthermore, Breard states that he is raising this claim on appeal only "to preserve this claim for future review should such be necessary." *See* Petitioner's Br. at 37. As a panel of this court, we are bound by *Bennett* and *Spencer*, *see Jones v. Angelone*, 94 F.3d 900, 905 (4th Cir. 1996) (one panel of this court may not overrule another panel's decision); therefore, we must reject Breard's attack on the constitutionality of the aggravating circumstances instructions given by the trial court.

III

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

BUTZNER, *Senior Circuit Judge*, concurring:

I concur in the denial of the relief requested by Angel Francisco Breard. I write separately to emphasize the importance of the Vienna Convention.

I

The Vienna Convention facilitates "friendly relations among nations, irrespective of their differing constitutional and social systems." The Vienna Convention on Consular Relations, *opened for signature* Apr. 24, 1963, 21 U.S.T. 78, 79 (*ratified by the United States* Nov. 12, 1969). Article 36, provides:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

* * *

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph; (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
>
> 2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended. *Id.* at 101.

II

The Vienna Convention is a self executing treaty--it provides rights to individuals rather than merely setting out the obligations of signatories. *See Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (assuming the same). The text emphasizes that the right of consular notice and assistance is the citizen's. The language is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government.

The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states. *See Head Money Cases*,

112 U.S. 580, 598-99 (1884). The Supremacy Clause mandates that rights conferred by a treaty be honored by the states. United States Const. art. VI, cl. 2. The provisions of the Convention should be implemented before trial when they can be appropriately addressed. Collateral review is too limited to afford an adequate remedy.

III

The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world--as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895).

The State Department has advised the states, including Virginia, of their obligation to inform foreign nationals of their rights under the Vienna Convention. It has advised states to facilitate consular access to foreign detainees. Prosecutors and defense attorneys alike should be aware of the rights conferred by the treaty and their responsibilities under it. The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

U.S. CONST. art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls * * *

U.S. CONST. art. VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

Vienna Convention on Consular Relations,
Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261

* * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to

communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091

* * *

Article XII

* * *

The diplomatic agents and consuls of the United States of America in the territories of the Republic of Paraguay shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to the diplomatic agents and consuls of any other nation whatever; and, in like manner, the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever.

Consular Convention, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426

* * *

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

Consular Convention, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018

* * *

Article 12

* * *

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.

3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment. The rights referred to in this paragraph shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must not nullify these rights.

* * *

PROTOCOL
To the Consular Convention Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics

1. It is agreed between the Contracting Parties that the notification of a consular officer of the arrest or detention in other form of a national of the sending state specified in paragraph 2 of Article 12 of the Consular Convention between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics of June 1, 1964, shall take place within one to three days from the time of arrest or detention depending on conditions of communication.

2. It is agreed between the Contracting Parties that the rights specified in paragraph 3 of Article 12 of the Consular Convention of a consular officer to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody shall be accorded within two to four days of the arrest or detention of such national depending upon his location.

* * *

Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, 30 U.S.T. 17

* * *

5. If a citizen of the sending country is arrested or detained in any manner, the authorities of the receiving country shall, without delay, notify the consular post or embassy accordingly of the arrest or detention of the person and permit access by a consular officer of the sending state to the citizen who is under arrest or detained in custody.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 1988), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847, 3853 (October 19, 1996) (WESTLAW through all 1996 legislation).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs,

-against-

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; JAMES S. GILMORE III, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; J.D. NETHERLAND, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; and WILLIAM K. STOVER, Chief of Police for the County of Arlington,

Defendants.

Civil Action No.

COMPLAINT

(For Declaratory And Other Relief For Defendants' Violations Of Two Treaties Of The United States)

This action is brought by plaintiffs Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José Antonio Dos Santos, as Consul General of the Republic of Paraguay to the United States, for the defendants' violations of their duties to the plaintiffs under two treaties of the United States of America.

NATURE OF THE ACTION

1. Plaintiffs bring this action for declaratory and injunctive relief preventing the defendants from continuing their violations of the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention") and the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty").

2. In addition, plaintiff Dos Santos seeks equitable relief, pursuant to this Court's powers under 42 U.S.C. § 1983, requiring the defendants to accord plaintiffs the rights under those treaties that wrongfully have been withheld and reinstating the status quo as of the time plaintiffs' rights were violated.

3. In violation of treaty obligations binding on defendants as the law of the United States and owed directly to the Republic of Paraguay and its consular officers, the defendants and their predecessors, employees, officers and agents (*I*) failed to inform a Paraguayan citizen, Angel Francisco Breard, after he was arrested of his right to seek the assistance of Paraguayan consular officers, as

required by article 36, section 1(b) of the Vienna Convention, (*2*) failed to notify Paraguayan consular officers directly that a Paraguayan citizen had been arrested, as required by article XII of the Friendship Treaty, and (*3*) failed to provide plaintiffs a meaningful opportunity to provide consular assistance to Mr. Breard during the proceedings against him, as required by those two treaties.

JURISDICTION AND VENUE

4. This is a case "affecting Ambassadors . . . and Consuls" within the original jurisdiction of the United States Supreme Court under article III, section 2 of the United States Constitution. Under 28 U.S.C. § 1251(b)(1), however, the original jurisdiction of the United States Supreme Court is not exclusive. This action may properly be brought in this Court.

5. This action arises under two treaties of the United States, the Vienna Convention and the Friendship Treaty, and under 42 U.S.C. § 1983. This Court has subject matter jurisdiction under 28 U.S.C. § 1331.

6. The defendants reside in this district. The acts complained of herein have all taken place, and continue to take place, in this district. The claims arose in this district. Venue is proper under 28 U.S.C. § 1391(b).

7. All defendants reside in the Commonwealth of Virginia and at least one defendant resides within this division. A substantial part of the events or omissions giving rise to the claims asserted herein occurred in this division. Suit may properly be instituted in this division pursuant to Local Rule 4 and 28 U.S.C. § 1391(b)(1).

THE PARTIES AND OTHER RELEVANT PERSONS

8. Plaintiff Republic of Paraguay is a foreign state.

9. Plaintiff Jorge J. Prieto is the Ambassador of the Republic of Paraguay to the United States. At all relevant times, he had supervisory authority over the consular officers of the Republic of Paraguay in the United States, including consular officers based in the Embassy of Paraguay in Washington, D.C.

10. Plaintiff José Antonio Dos Santos is the Consul General of the Republic of Paraguay to the United States with jurisdiction over the consular district encompassing the Commonwealth of Virginia.

11. Plaintiffs Prieto and Dos Santos bring this action in their capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay.

12. Angel Francisco Breard is a citizen of Paraguay and, on information and belief, also of Argentina. His dominant citizenship is Paraguayan. Mr. Breard is not a citizen of the United States. He is currently a prisoner of the Commonwealth of Virginia and has been sentenced to death. But for the defendants' violations of the Vienna Convention and the Friendship Treaty, Mr. Breard would not currently face the death penalty.

13. Defendant George F. Allen is the Governor of the Commonwealth of Virginia. Pursuant to article V, section 7 of the Constitution of Virginia, the Governor is responsible for "tak[ing] care that the laws be faithfully executed." That responsibility, by virtue of the Supremacy Clause of the United States Constitution, extends to treaties signed by the United States and ratified by the United States Senate. U.S. Const. art. VI.

14. Defendant James S. Gilmore III is the Attorney General of the Commonwealth of Virginia. He is "the chief executive officer of the Department of Law, and as such shall perform such duties as may be provided by law," including, together with the Commonwealth's Attorney, notifying the trial court that an execution date is to be set when all appeals and collateral proceedings in a death penalty case are completed. Va. Code Ann. §§ 2.1-117, 53.1-232.1 (1996).

15. Defendant Ronald J. Angelone is the Director of Corrections for the Commonwealth of Virginia and is ultimately responsible for carrying out sentences involving a felony in the Commonwealth of Virginia. Va. Code Ann. §§ 19.2-310, 53.1-17, 53.1-20 (1996).

16. Defendant David A. Garraghty is the Warden of the Greensville Correctional Facility in Jarratt, Virginia, and is responsible for executing prisoners sentenced to death in the Commonwealth of Virginia.

17. Defendant J.D. Netherland is the Warden of the Mecklenburg Correctional Facility in Boydton, Virginia, and is responsible for incarcerating prisoners held in that facility, including Mr. Breard.

18. Defendants Paul F. Sheridan, Benjamin N.A. Kendrick, William Newman, Jr. and William L. Winston are Judges of the Circuit Court of Arlington County, Virginia. Under the Virginia Code, Judges of the Circuit Court of Arlington County have administrative responsibility for setting an execution date for Mr. Breard. Va. Code Ann. §§ 53.1-232.1, 53.1-232, 53.1-234 (1996).

19. Defendant Richard E. Trodden is the Commonwealth's Attorney for the County of Arlington and is responsible, together with the Chief of Police, for law enforcement activities in the County of Arlington. Va. Code Ann. §§ 15.1-643, 15.1-8.1 (1996).

20. Defendant William K. Stover is the Chief of Police for the County of Arlington and is responsible, together with the Commonwealth's Attorney, for law enforcement activities in the County of Arlington. Va. Code Ann. § 15.1-769 (1996).

FACTS

The Vienna Convention

21. On April 24, 1963, exercising the exclusive power to conduct foreign relations granted to the President of the United States, an officer of the executive branch of the United States signed the Vienna Convention. U.S. Const. art. I, sec. 10; *id.* art. II, sec. 2. The Senate ratified the Vienna Convention on October 22, 1965. The Vienna Convention is part of the "supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

22. Paraguay deposited its instrument ratifying the Vienna Convention on December 23, 1969. The Vienna Convention entered into force as between Paraguay and the United States thirty days thereafter. The Vienna Convention is in force as between the United States and Paraguay.

23. The Vienna Convention is a self-executing treaty. No legislation is required to implement its provisions.

24. The Vienna Convention recognizes that sovereign states, such as the Republic of Paraguay, have an interest in protecting the life, liberty and property of their citizens abroad, and that that interest can only be safeguarded by protecting the functions of consular officers.

25. Among the consular functions protected by the Vienna Convention are

> (a) protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law; . . .
>
> (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state; . . .
>
> (i) . . . representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests; . . .

Vienna Convention art. 5.

26. In the context of the arrest or detention of foreigners, the Vienna Convention defines the functions of the foreign prisoner's consulate. If an arrested foreigner so requests:

> the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or

> detention shall also be forwarded by the said authorities without delay.

Id. art. 36, sec. 1(b).

27. It is the express obligation of the host authorities to "inform the person concerned without delay of his rights under this subparagraph [article 36, section 1 of the Vienna Convention]." *Id.*

28. The obligation imposed by article 36, section 1 of the Vienna Convention, and the attendant right granted thereby, is owed separately and independently to the arrested foreigner and to the consular officers of the relevant state party to the Vienna Convention.

The Friendship Treaty

29. On February 4, 1859, the Governments of Paraguay and the United States entered into a treaty of Friendship, Commerce, and Navigation. On February 11, 1859, Paraguay ratified the Friendship Treaty.

30. The Senate ratified the Friendship Treaty on February 27, 1860. The Friendship Treaty is in effect between the United States and Paraguay.

31. The Friendship Treaty is self-executing. No legislation is required to implement its provisions.

32. Under article XII of the Friendship Treaty, "the Diplomatic Agents and Consuls of the Republic of Paraguay in the Untied States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, there granted to Agents of any other Nation whatever."

33. Under bilateral agreements with numerous other nations, including the United Kingdom and the Russian Federation, the United States has granted to consuls of those nations the privilege of receiving immediate and mandatory notification of the arrest or detention of one of their nationals. *E.g.*, Convention Regarding Consular Officers, June 6, 1951, U.S.-U.K., art. 16, 3 U.S.T. 3426; Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2) & sec. 1 of protocol, 19 U.S.T. 5018; Agreement on Consular Relations, Jan. 31, 1979, U.S.-China, sec. 5, 30 U.S.T. 17.

34. Authorities in the United States arresting a citizen of Paraguay are therefore required, pursuant to article XII of the Friendship Treaty, immediately to notify Paraguayan consular officers of the arrest or detention of a Paraguayan citizen.

Defendants' Failure To Comply With
The Treaties' Notification Requirements

35. The United States Department of State informs state officials of the duties of arresting authorities under the Vienna Convention and bilateral treaties through periodic printed notices. These notices place state officials on notice of the requirement that any detained citizen of a nation that has signed the Vienna Convention "must be informed without delay of the right to have his/her government notified" and provide them with the addresses and telephone numbers of the embassies and consulates of nations to which the duties are owed. Paraguay and Argentina are among the nations specifically listed, and for whose embassies and consulates the addresses and telephone numbers are provided.

36. Defendants or their predecessors, employees, officers or agents had received such notices from the United States Department of State before the arrest of Mr. Breard described below.

37. Nevertheless, for an extended period of time, and, in the very least, since 1991, the defendants and their predecessors, employees, officers and agents have adhered to a pattern and practice of disregarding their obligations to notify consular officers under the Vienna Convention and bilateral treaties.

Mr. Breard's Arrest

38. On September 1, 1992, Mr. Breard was arrested by the Arlington County police department for the murder of Ruth Dickie.

39. On information and belief, defendants or their predecessors, employees, officers or agents were aware prior to Mr. Breard's trial that he was a Paraguayan citizen.

40. Neither the defendants, their predecessors, employees, officers or agents, nor any agent of the United States ever informed Mr. Breard of his rights under Article 36 of the Vienna Convention.

41. Mr. Breard was unaware of the Vienna Convention until sometime in May 1996. He had no knowledge of the rights accorded him pursuant to the Vienna Convention.

42. Had the defendants informed Mr. Breard of his rights under Article 36, he would have exercised his right to contact the Argentine and Paraguayan consulates for assistance with his defense.

43. Neither the defendants, their predecessors, employees, officers or agents, nor any agent of the United States has ever informed the Republic of Paraguay or its consular officers at any time that the Commonwealth arrested Mr. Breard.

44. Had Paraguayan consular officers been notified of Mr. Breard's arrest, plaintiffs Prieto or Dos Santos or other such officers would have provided Mr. Breard assistance including consular visits to Mr. Breard; advice on cultural and legal differences between Mr. Breard's countries and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; an interpreter; additional or other legal counsel; the location of family members for assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defense; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; and other forms of assistance both legal and non-legal.

Mr. Breard's Court Proceedings In Virginia

45. On October 19, 1992, Mr. Breard was indicted for attempted rape and for the capital offense of murder in the commission of or subsequent to rape or attempted rape. On June 21, 1993, he was arraigned and pleaded not guilty to these charges. He was represented by court-appointed counsel. The plaintiffs were strangers to Mr. Breard's criminal proceedings.

46. Before trial, the Commonwealth of Virginia made clear to Mr. Breard's defense counsel that, if Mr. Breard would agree to plead guilty to the murder, the Commonwealth would not seek the death penalty. Against the advice of his defense counsel, Mr. Breard refused to accept the plea offer.

47. On information and belief, Mr. Breard's refusal to accept the plea offer was based upon a fundamental misunderstanding of the differences between the criminal justice system in the United States and that in Paraguay, which tends to extend leniency to defendants who voluntarily confess to their crimes at trial and renounce their past

criminal conduct. Had Paraguayan consular officers been afforded their right to communicate with Mr. Breard, they would have explained these distinctions to Mr. Breard and been able to review with him the desirability of the proffered plea agreement more effectively than his defense counsel, who were essentially unfamiliar with Paraguay's system of criminal justice and social mores.

48. Mr. Breard's criminal trial took place between June 21 and June 25, 1993. No interpreter was provided for Mr. Breard at any stage of the proceedings in this case. Mr. Breard was not aware that even though he spoke and understood English to a degree, he was nevertheless entitled to an interpreter to assist him.

49. Against the advice of his counsel, Mr. Breard voluntarily took the witness stand, confessed to the crimes charged and renounced his past criminal conduct.

50. On June 24, 1993, the jury returned a verdict of guilty. On June 25, 1993, after hearing evidence related to sentencing, the jury sentenced Mr. Breard to death.

51. As a result of the defendants' failure to respect the consular communication rights provided by the Vienna Convention and the Friendship Treaty, Paraguayan consular officers were unable to assist Mr. Breard in collecting and presenting at the sentencing phase material mitigating evidence that could have been offered in support of a sentence of imprisonment rather than death.

52. On August 22, 1993, the court conducted a sentencing hearing and entered an order in accordance with the verdict, setting Mr. Breard's execution date for February 17, 1994. The court subsequently stayed Mr. Breard's execution to allow the filing of his appeals.

53. Mr. Breard's direct appeals in the courts of the Commonwealth of Virginia were rejected. In addition, Mr. Breard's state habeas corpus proceedings were unsuccessful. There are no further judicial proceedings concerning Mr. Breard pending in the courts of the Commonwealth of Virginia.

54. On August 30, 1996, Mr. Breard filed a petition for a writ of habeas corpus in this Court. Mr. Breard is currently being held on death row at the Mecklenburg Correctional Facility. No date for his execution is scheduled.

55. Unless Mr. Breard's conviction is vacated and the defendants are ordered to comply with applicable treaties in any further proceedings concerning Mr. Breard, plaintiffs will have no meaningful opportunity to exercise the rights guaranteed to them by the Vienna Convention and the Friendship Treaty.

COUNT ONE
(Continuing Violation of the Vienna Convention)

56. Plaintiffs repeat and reallege paragraphs 1 through 55.

57. Defendants, their predecessors, employees, officers and agents violated their legal obligations, pursuant to Article 36 of the Vienna Convention, to inform Mr. Breard after he was arrested on September 1, 1992 of his right to seek the assistance of Paraguayan consular officers.

58. The legal obligations violated by the defendants are owed both to Mr. Breard and to the Republic of Paraguay and its consular officers. The defendants' violations prevented plaintiffs Prieto and Dos Santos and other Paraguayan consular officers from aiding and

advising Mr. Breard in the complex details of his arrest, trial and post-conviction proceedings.

59. On information and belief, the United States and the Republic of Paraguay are in accord on the interpretation and application of the Vienna Convention with respect to Mr. Breard's case.

60. As a result, the defendants' violation of the Vienna Convention rendered Mr. Breard's conviction void.

61. Any further actions by the defendants, their successors, employees, officers or agents based on Mr. Breard's illegal conviction would constitute a continuation of the violation of the Vienna Convention and, therefore, the law of the United States.

COUNT TWO
(Violation of the Friendship Treaty)

62. Plaintiffs repeat and reallege paragraphs 1 through 61.

63. Defendants, their predecessors, employees, officers and agents violated their legal obligations, pursuant to article XII of the Friendship Treaty, immediately to notify Paraguayan consular officers of the fact that a Paraguayan citizen, Mr. Breard, had been arrested within the defendants' jurisdiction.

64. Defendants' failure to abide by the law, as prescribed by the Friendship Treaty, prevented plaintiffs Prieto and Dos Santos and other Paraguayan consular officers from assisting Mr. Breard in the legal processes he was subjected to following his arrest and renders Mr. Breard's conviction void.

65. Any further actions by defendants or their successors, employees, officers or agents based on Mr. Breard's illegal conviction would constitute a continuation of the violation of the Friendship Treaty and, therefore, the law of the United States.

COUNT THREE
(Violation of 42 U.S.C. § 1983)

66. Plaintiffs repeat and reallege paragraphs 1 through 65.

67. Plaintiff Dos Santos is a person within the jurisdiction of the United States.

68. Pursuant to the Supremacy Clause, the Vienna Convention and the Friendship Treaty secured to plaintiffs, under the laws of the United States, the rights and privileges to have Mr. Breard informed of his right to seek the assistance of Paraguayan consular officers after he was arrested, to be notified directly and immediately that Mr. Breard had been arrested within the jurisdiction of the defendants and to provide meaningful consular assistance to Mr. Breard during the course of the proceedings against him.

69. Defendants, and their predecessors, employees, officers and agents, acted under color of state law in failing to inform Mr. Breard of his rights, to notify plaintiffs of Mr. Breard's arrest and to provide plaintiffs a meaningful opportunity to communicate with and otherwise assist Mr. Breard during the course of the proceedings against him.

70. Defendants' acts and omissions constitute violations of plaintiffs' rights and privileges under the laws of the United States and empower this Court to grant equitable relief under 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

A. Declare that the defendants violated the provisions of the Vienna Convention by failing to notify Mr. Breard of his right to seek the assistance of the Consul General of Paraguay.

B. Declare that the defendants violated the provisions of the Friendship Treaty by virtue of their failing immediately to notify the consular officers of the Republic of Paraguay that Mr. Breard, a citizen of Paraguay, had been arrested.

C. Declare that the defendants violated, and continue to violate, the provisions of both such treaties by failing to afford plaintiffs a meaningful opportunity to provide Mr. Breard consular assistance during the proceedings against him.

D. Declare the conviction of Mr. Breard void.

E. Declare that any future actions taken by defendants based on the illegal conviction of Mr. Breard, including his execution, would constitute continuations of the violations of the Vienna Convention and the Friendship Treaty, and enjoin the defendants from committing any such future violations.

F. Order prospective injunctive relief requiring vacation of Mr. Breard's conviction and mandating that the defendants, in any further proceedings involving Mr. Breard, afford plaintiffs all rights due them under the Vienna Convention and the Friendship Treaty.

G. Grant such other and further relief as to this Court seem just and proper.

September 11, 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE REPUBLIC OF ARGENTINA, REPUBLIC OF BRAZIL, REPUBLIC OF ECUADOR, AND REPUBLIC OF MEXICO IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.
INTEREST OF AMICI CURIAE

Amici nations[1] have a vital interest in ensuring compliance with the Vienna Convention on Consular Relations[2] by the United States and its political subdivisions. The protection and support of persons who have been charged with crimes, convicted, or imprisoned by a foreign nation has always been a critical function of consular officials. Thousands of nationals of amici nations travel to the United States each year or reside in this country, and it is incumbent on the consular officials of amici nations to assist and protect those that become involved with the criminal justice system here. Consuls can discharge that responsibility only if they know of the detention of their nationals by law enforcement authorities. Article 36 of the Convention is designed specifically to ensure that consuls *do* know of the detention of their nationals, and compliance with it is therefore indispensable to the effective performance of consular functions. Those functions can include addressing appropriate authorities on behalf of the detained national, assisting in discovery and collection of mitigating evidence, monitoring of proceedings and incarceration, and advising detained nationals about the United States justice system and differences between that system and the justice system in the accused's country of origin.

The United States is the only Western industrialized nation that still imposes the death penalty.[3] Because of the severity of the potential punishment, a consul has a special interest in assisting a national who faces a capital charge. The failure of law enforcement

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[1]Pursuant to the disclosure requirement of Rule 37.6 of the Rules of this Court, Amici make the following disclosures: This Brief was not authored in whole or in part by counsel for any party, and no monetary contribution to the preparation or submission of the Brief was made by any person or entity other than Amici or their counsel.

[2]April 24, 1963, T.I.A.S. 6820, 21 U.S.T. 77 [hereinafter "Vienna Convention," "Convention," or "VCCR"].

[3]*See* Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries*, at 5 (1996).

officials in the United States to comply with Article 36's consular notification provision eviscerates consuls' right to assist, protect, and ensure the fair treatment of their nationals. Indeed, the case of Angel Breard, from which the instant action by Paraguay arises, is by no means unique. In several other capital cases, a foreign state or national has raised the issue of non-compliance with the Vienna Convention in the federal courts.[4] Courts, while recognizing the existence of recurring violations of the Vienna Convention, have considered themselves unable to grant relief.

Thus, amici nations have a vital interest in persuading this Court to hear Paraguay's case.[5] A decision by this Court would establish a nationwide precedent that would extend beyond the particular action to every instance in which authorities arrest a foreign national. Further, as the United State has itself recognized, the continuing vitality of the Vienna Convention depends upon reciprocity of enforcement between foreign nations. Thus, the resolution of this case will have a direct effect on each amicus nation. In the absence of a decision by this Court, violations of the Vienna Convention will continue unabated and amici nations will be denied their rights under United States and international law.[6]

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[4]For examples of capital cases in which the issue of non-compliance with the Vienna Convention has arisen, *see, e.g., United Mexican States v. Woods*, 126 F.3d 1220, 1222-1223 (9th Cir. 1997) (Arizona); *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (Virginia); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (Texas).

[5]Because of the substantial importance it attaches to consular notification, the Republic of Mexico has requested an advisory opinion before the Inter-American Court of Human Rights of the Organization of American States on this issue.

[6]Argentina's interest in this action is based not only on the respect that all states owe to the Vienna Convention, but also upon the fact that Mr. Breard was born in Argentina and is of Argentine origin.

II.
RESERVATION OF IMMUNITY

Nothing in this Brief shall be construed as a waiver of the immunity to which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico is entitled by virtue of international law or the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*, any immunity or privilege established by the Vienna Convention or of any defense, right, or immunity which the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico may have a right to assert. It also shall not imply a submission to the jurisdiction of the United States by the Republic of Argentina, Republic of Brazil, the Republic of Ecuador, or the Republic of Mexico.

III.
STATEMENT OF CONSENT OF PARTIES

The written consents of Petitioner and Respondents to the filing of this Brief of Amicus Curiae are filed concurrently and attached hereto.

IV.
SUMMARY OF ARGUMENT

The Vienna Convention plays a vital role in the protection and fair treatment of foreign nationals present in another state by requiring, among other things, that arresting authorities promptly notify a foreign national of his or her right to contact a consular official. The right to contact a consular official is a critical one, as the United States has repeatedly recognized in actions and statements by the Departments of State and Justice. In fact, the United States is one of the most vociferous advocates of the Convention and insists upon strict compliance with it when an American is detained abroad. However, the viability of the Vienna Convention depends on reciprocal compliance by signatory states. Failure to comply by one nation imperils the entire structure established by the Convention. By failing to inform arrested foreign nationals of their rights, officials of Virginia and other states have imperiled the continuing viability of the Vienna Convention.

Adherence to the Vienna Convention ensures that consuls can continue to provide substantial and meaningful assistance to their nationals. That assistance can include addressing local authorities on behalf of an accused national, assistance in the discovery and collection of mitigating evidence, and monitoring of concerning proceedings and incarceration.

The Fourth Circuit's decision, *Paraguay v. Allen*, No. 96-2770, ___F. 3d ___ (4th Cir. Jan. 22, 1998) (reproduced in the Petition for Certiorari, at A1-A12), holding that the Eleventh Amendment bars federal judicial review of Paraguay's claims, ignores the continuing interests of sovereign nations in the welfare of their citizens and effectively condones ongoing violations of the Vienna Convention by state officials. That decision would deprive the amici nations of the natural and appropriate forum for redressing those ongoing violations of their international treaty rights: the federal courts, which are constitutionally charged with redressing treaty violations. The Fourth Circuit, in simultaneously ruling that Breard cannot raise the Vienna Convention violation in his habeas proceeding and that Paraguay is too late to obtain a remedy for Virginia's wholesale disregard of the Convention, has ruled that the federal courts can afford no remedy for the violation of rights accruing under a treaty ratified by the President with the advice and consent of the United States Senate, and having the force of federal law. By denying an effective remedy for violations of the Vienna Convention — a treaty which, as the United States has recognized, depends upon reciprocity between nations — the decisions of the Fourth Circuit thus imperil the continuing viability of an international treaty that the United States itself views as a vital component of international law. Because the continuing vitality of the Vienna Convention may depend upon its outcome, this case presents an "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

V.
ARGUMENT

A. The Vienna Convention Plays A Vital Role In Ensuring The Protection And Fair Treatment Of Nationals Of One State Who Are Present in Another State.

Nations entered into the Vienna Convention to affirm and codify consular practice, which had existed in various forms since ancient times. *See* Luke T. Lee, *Consular Law and Practice* 23 (2d ed. 1991); VCCR, Preamble. The United Nations Conference on Consular Relations promulgated the Convention on April 24, 1963, and the United States ratified it on November 24, 1969. T.I.A.S. 6820, 21 U.S.T. 77. As stated in its preamble, the Convention was established in order to "contribute to the friendly relations among nations, irrespective of their differing constitutional and social systems" and to "ensure the efficient performance of functions by consular posts on behalf of their respective States." VCCR, Preamble. The Vienna Convention has been described as "the single most important event in the history of the entire consular institution." Lee, *supra*, at 26. Moreover, "after 1963, there can be no settlement of consular disputes or regulation of consular relations, whether by treaties or national legislation, without reference or recourse to the Vienna Convention." *Id.* In sum, the Vienna Convention establishes the framework for consular law and practice throughout the world and serves as a cornerstone of international law and international relations.

The Vienna Convention addresses many matters of consular law and practice, including establishment of consular posts, appointment of consuls, inviolability of consular officers, posts, and records, and exemption of consular posts from taxation. *See, e.g.*, VCCR, Arts. 4, 10, 41, 31, 33, 32. Included in the list of matters addressed by the Convention is the right of communication between a consul and a detained national of the consul's state. *See* VCCR, Art. 36. To secure that right, Article 36 requires that authorities of the "Receiving State" notify a foreign national,

"without delay," of that national's right to contact a consular official of the "Sending State."[7] Article 36 provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
>
> (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. . . . The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
>
> (c) consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officials shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

Id.

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[7]In the terminology of the Vienna Convention, "Receiving State" refers to the country which detains a foreign national, and "Sending State" refers to the country of origin of the detained person.

The importance of the consular functions secured by Article 36 cannot be overstated. As nations of the world have recognized, consular assistance can be critical to the well-being of a national detained in a foreign country. *See, e.g.*, S.A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 St. Mary's L.J. 719, 721 (1995) ("To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access"); Lee, *supra*, at 134 ("Essential to the fulfillment of a consul's protective functions are his right to be informed immediately of a detention of nationals . . . ."). In fact, this Court need look no further than the concurring opinion in Angel Breard's own habeas corpus action to see the importance of Vienna Convention and the right to consular notification that it secures. As Judge Butzner stated in that opinion:

> The protections afforded by the Vienna Convention go far beyond Breard's case. . . .
>
> . . .
>
> Prosecutors and defense attorneys alike should be aware of the rights conferred by the treaty and their responsibilities under it. The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

Breard v. Pruett, No. 96-25, __ F. 3d ___ (4th Cir. Jan. 22, 1998) (Butzner, J., concurring) (reproduced in the Petition for Certiorari, at A23-A34).

The United States Government has itself, on numerous occasions, recognized the critical nature of the rights accorded by Article 36. In 1973, the Department of State stated:

> In the Department's view, Article 36 of the Vienna Convention contains *obligations of the highest order* and should not be dealt with lightly. Article 36, paragraph 1(b), requires the authorities of the receiving state to notify the consular post of the sending state without delay of the arrest or

> commitment of a national of the sending state, if that national so requests. While there is no precise definition of "without delay," it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of *a few days*.

Arthur W. Rovine, Dep't. of State, *Digest of United States Practice in International Law*, 1973, at 161 (emphasis added). Indeed, the State Department had recognized the importance of consular access to a detained individual even prior to the United States' accession to the Vienna Convention,[8] and even after worldwide adoption of the Convention, the United States remains a signatory to bilateral treaties that require notification to consular officials within a specific number of days.[9]

In fact, the State Department has on several occasions taken action in response to other nations' failure to comply with Article 36 or, more generally, to notify United States consular officials directly of the detention of American citizens abroad. In what was perhaps its most celebrated action on the subject, the State Department chastised the Syrian government for failing to notify, in accordance with the requirements of a bilateral agreement and

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[8]Numerous bilateral treaties that predate the Convention contain provisions for consular notification in the event of an arrest. *See* E. Kerley, *Contemporary Practice of the United States Relating to International Law*, 57 Am. J. Int'l L. 403, 411-18 (1963) (listing United States' treaty provisions in effect as of January 1, 1963, that required notification to consuls upon arrest of a foreign national).

[9]*See* 8 C.F.R. § 236.1(e) & n.1 (listing those countries that have agreements with United States requiring notification of an arrest within seventy-two hours).

customary international law,[10] the United States consul in Damascus of the detention of two Americans:

> The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations. . . . Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar . . . . The consul, while fully complying with the law of the detaining state, is able to assist these nationals in securing and preserving their rights, often by helping them to obtain local counsel. The consul's presence may also help assuage the distress of detained nationals.

Lee, *supra*, at 145 (quoting Department of State, *Telegram 40298 to Embassy Damascus*, Feb. 21, 1975). Shortly after the State Department made that representation to the Syrian government, the consul was granted access to the American prisoners. *Id.*

In a subsequent incident involving the detention of American citizens in El Salvador, the State Department specifically

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[10]The bilateral agreement in question was a September 1924 "exchange of notes" between the United States and France, with which the Syrian government agreed to comply upon recognition of its independence in 1944. *See* Lee, *supra*, at 145-46. Under that agreement, the Syrian government had an obligation to notify the American consulate upon the arrested person's declaration of American citizenship. Although this obligation differs in form from Article 36, the quoted text indicates that, in the State Department's view, it served the same purpose as Article 36 — the facilitation of consular assistance. Indeed, in the telegram to the Syrian government, the State Department specifically referred to the Vienna Convention as relevant to establishing Syria's obligation to notify, because the Convention sets forth the "accepted . . . standard of international practice of civilized nations, whether or not they are parties to the Convention." *Id.*

protested the very same violation of Article 36 claimed by Paraguay in this case — the failure to notify the arrested national of his right to contact a consular representative. Two Americans were detained by Salvadoran authorities for taking a photograph of a police station, which was deemed a "national security installation," during a "state of siege." Although the authorities released the individuals after 32 hours of detention, the State Department nevertheless lodged a protest note requesting the Salvadoran Minister of Foreign Relations "elaborate expeditiously" as to

> [w]hy the [first mentioned] two United States citizens were not informed of their right to contact the Consulate as provided under article 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States citizens until approximately 28 hours afterward.

Lee, *supra*, at 149 (quoting, Dep't. of State, *Digest of United States Practice in International Law*, 1977, at 290).

Paraguay complains of the very same violation that the State Department did — the failure to notify a detained foreign national of his right to contact a consular representative. Moreover, in contrast to the 32-hour detention of Americans in El Salvador, Virginia authorities detained Angel Breard for months and tried him for murder without ever informing him of his right to contact the Paraguayan consulate. The violation of Article 36 that occurred in the Breard case was far more severe that the violation protested by the State Department to the government of El Salvador in the instance mentioned above. Virginia officials knew of their obligations under the Vienna Convention because the State Department had advised them (and all other state officials) to facilitate consular access of foreign detainees. *See Breard*, *supra*, at A34 (Butzner, J., concurring); *see also* Kerley, *supra* n. 4, at 411.

Like the State Department, the United States Department of Justice has taken action that underscores the importance of consular notification under the Vienna Convention: the enactment of regulations compelling federal law enforcement authorities to

comply with the consular notification provisions of the Vienna Convention. *See* 28 C.F.R. § 50.5, 50.5(a); 8 C.F.R. § 236.1(e). Any federal officer arresting a foreign national must inform the national that a consul will be notified of the arrest, unless the arrested person does not wish it. *See id.* § 50.5(a)(1); *see also* 8 C.F.R. § 236.1(e) & n.1. In the case of aliens detained for criminal, rather than immigration law violations, the arresting officer must notify the United States Attorney, who, in turn, has the obligation of notifying the consul of the arrested person's state. *See id.* § 50.5(a)(2). These regulations demonstrate the high priority that the federal government places upon compliance with Article 36 and other similar provisions.

One federal court has set aside a conviction for illegal entry after deportation, as a result of immigration authorities' failure to comply with 8 C.F.R. § 242(e) (1978), the predecessor to present-day § 236.1(e). In *United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980), the court reversed a conviction on the ground that the underlying order of deportation was invalid, because the arresting authorities had failed to notify the defendant, at the time of his initial detention, of his right to contact a consular official under § 242(e), and this failure had prejudiced the defendant. The court determined that prejudice was present because the defendant would have contacted consular officials if he had known of his right and such contact "may well have led not merely to the appointment of counsel, but also to community assistance in creating a more favorable record to present to the immigration judge." 617 F.2d at 531. *Rangel-Gonzales* built upon the court's earlier decision in the same case, *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979), in which the court held that an alien could obtain a reversal of a conviction for violation of § 242(e) at the time of detention, if the alien could show that the violation resulted in prejudice.

B. As the United States Has Recognized, The Continuing Viability Of Article 36 Depends On Reciprocal Compliance.

As this Court recognized more than a century ago, "international law is founded upon mutuality and reciprocity." *Hilton v. Guyot*, 159 U.S. 113, 228 (1895). As a result, the "freedom and safety" of Americans abroad "are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example." *Breard*, *supra*, at A34 (Butzner, J., concurring). In fact, the State Department emphasized the importance of nations' reciprocal compliance with consular notification provisions in the protest to the Syrian government that was mentioned earlier:

> The recognition of these rights [consular access and notification] is prompted in part by considerations of reciprocity. States accord these rights to other states in the confident expectation that if the situation were to be reversed they would be accorded equivalent rights to protect their nationals. *The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals.*

Lee, *supra*, at 145 (quoting Department of State, *Telegram 40298 to Embassy Damascus*, Feb. 21, 1975) (emphasis added).

Virginia's actions in this case flatly contradict the State Department's assurances. The ongoing failure by states throughout the Union to comply with Article 36[11] threatens to undermine the Convention's continued viability for the very reason identified by the State Department in the foregoing declaration: the right of consular notification depends upon "considerations of reciprocity" among nations. On another occasion, the State Department

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[11] *See* Amnesty International, *Violation of the Rights of Foreign Nationals Under Sentence of Death* (Jan. 1998) at 1.

likewise recognized the impact on international relations of a state's failure to comply with Article 36. In the case of Mario Murphy, a Mexican national, the Department issued a formal apology to the government of Mexico for Virginia's failure to comply with Article 36 — on the day *after* Murphy's execution. *See* Amnesty International, *Violation of the Rights of Foreign Nationals Under Sentence of Death* (Jan. 1998) at 3.

Thus, the resolution of this case may have a substantial effect on continued worldwide compliance with Article 36. If states of the United States can continue to disregard their obligations under the Vienna Convention with impunity — the effective result of a decision in favor of Virginia state officials — then the reciprocal compliance structure upon which Article 36 is built will be undermined. If violations of Article 36 are not remediable in the federal courts, the State Department, in seeking compliance with that Article by other nations, will have no rightful basis to assure reciprocity from the United States.

C. When A Consulate Knows That One Of Its Nationals Has Been Detained, It Can Provide A Wide Array Of Assistance That The Individual Would Not Otherwise Receive.

Consular notification does not exist for merely informational purposes. Rather, upon learning of the detention of a national, a consul can provide a wide array of assistance that the individual would not otherwise receive. Among other functions, the consul may address authorities of the Receiving State on behalf of the accused both prior to and after trial, assist in the discovery and collection of mitigating evidence, assist in obtaining more effective legal representation, monitor legal proceedings and incarceration to ensure fairness and compliance with international standards, and advise the national concerning the criminal justice system in his or her native state and the similarities to and differences from the criminal justice system in the arresting state. The United States and many other nations consider an accused person's access to these functions essential to the fair administration of justice. The reason for the importance the United States and other nations place upon consular functions becomes clear upon a detailed examination of those functions and their possible effect.

Addressing Authorities of the Receiving State Before and after Trial: The existence of prosecutorial discretion, particularly in whether to seek the death penalty,[12] creates a unique opportunity for the provision of consular assistance that a state may or may not choose to exercise in a particular case. If officials of the arrested foreign national's native state decide that the case is a proper one for doing so, those authorities may decide to request that prosecuting authorities not seek the death penalty. Consular representatives, moreover, are uniquely well positioned to provide information bearing on a prosecutor's exercise of discretion. That exercise will depend in part on mitigating factors, such as the defendant's criminal history and personal circumstances. *See* Dep't of Justice, *Principles of Federal Prosecution, U.S. Attorney's Manual*, at 9-27.230(B)(5), (7). As this Court has noted before, "the strength of the available evidence . . . may influence a prosecutor's decision to offer a plea bargain or to go to trial." *McCleskey*, 481 U.S. at 307 n.28. The evidence that bears upon discretionary factors will often be in the defendant's home country rather than in the United States, and the participation of consul therefore is an invaluable aid in gathering such evidence. *See* Note, *Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 Minn. L. Rev. 771, 772-73 n.6 (1994) (citing guidelines for Canadian consuls, which state that "a Canadian consul . . . will attempt to obtain case related information" on behalf of a charged national) (emphasis omitted).

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[12]Prior to trial, prosecutors in the United States traditionally have, as a matter of policy, "wide discretion" when deciding whether to seek the death penalty. *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987); Shank & Quigley, *supra*, at 740. More often than not, prosecutors will exercise that discretion against seeking the death penalty. *See id.* (citing Amnesty International, *United States of America: The Death Penalty* 29 (1987)); Mark Ballard, *Death's Right-Hand Man, Texas Lawyer*, May 29, 1995, at [*4] (*available in* LEXIS, LEGNEW library, TXLAWR file) (in Harris and Dallas, the two largest counties in Texas, prosecutors decided *not* to seek the death penalty in 90% and 94% of eligible cases, respectively). However, as this Court has acknowledged, that discretion leads to circumstances in which similarly situated persons will not receive similar punishment. *See McKleskey*, 481 U.S. at 307 n.28.

Discovery and Collection of Mitigating Evidence: A consul's role in the discovery and collection of mitigating evidence is not limited to attempts to influence prosecutorial discretion in the pre-trial stage. Instead, the presentation of mitigating evidence becomes particularly essential after conviction, during sentencing proceedings. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Constitution requires consideration by sentencer, "*as a mitigating factor*, any aspect of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death") (emphasis added). At that stage, consular assistance is essential to effective presentation of mitigating evidence because much of the mitigating evidence in the case of a foreign national defendant may be in the national's home country rather than in the United States. *See* Shank & Quigley, *supra*, at 723.

The types of assistance a consul may provide in the discovery and collection of mitigating evidence may vary. For example, a consul may assist the defendant's attorney by bringing witnesses to the United States for sentencing proceedings. Or, if those witnesses come to the United States on their own or at the behest of the defendant's attorney, the consul may provide assistance to the witnesses while they remain in the United States. The consul may also provide assistance by investigating the very existence of mitigating evidence in the defendant's home country. *See Strangers in a Strange Land, supra*, at 772 & n.5 (noting that in the case of Stanley Joseph Faulder, a Canadian sentenced to death in Texas, Faulder's attorney, with consular assistance, might have obtained favorable testimony from the defendant's family, all of whom were in Canada).

This Court has repeatedly emphasized the vital importance of the presentation of mitigating evidence to the fairness and constitutionality of capital sentencing procedures. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 368 (1993) (jury was properly told it "could consider all the mitigating evidence"); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett*, 438 U.S. at 604. In order for a sentencing procedure to be constitutional, the jury (or judge) must consider all mitigating evidence. *See Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (requiring consideration of *all* mitigating evidence prior to sentence); *Eddings*, 455 U.S. at 113-14. Because much of the mitigating evidence in many cases can be

obtained only if the defendant's attorney works in conjunction with the foreign national's consul, consular assistance — and, by extension, consular knowledge — is essential to the fairness of sentencing proceedings.

Assistance in Obtaining More Effective Representation: Many countries require their consuls to provide a detained national with various levels of assistance in obtaining more effective legal representation. In fact, the Vienna Convention itself lists this type of assistance as a consular function: "Consular functions consist in . . . representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State." VCCR, Art. 5(i); *see also id.* Art. 36(1)(c). Several states require their consuls to provide a detained national with a list of local lawyers who can provide competent representation.

For example, the State Department's consular instructions require a consul to provide a detained American with a list of attorneys that is tailored to the needs of the detained person by listing only those attorneys who are familiar with the type of law relevant to the detainee's case and by removing the names of "dishonest, incompetent, or inattentive" attorneys. Lee, *supra*, at 166 (quoting United States Dep't. of State, *Consular Instruction* 413.3). Similarly, the United Kingdom requires its consuls "to provide a list of lawyers for persons requiring legal aid." *Id.* at 125 (quoting United Kingdom *Foreign Service Instruction* VIII-16(iv)). Mexico requires its consuls "to assist and advise Mexicans in their dealings with local authorities" and "to represent Mexicans who are absent or otherwise incapable of handling their own affairs." Lee, *supra*, at 127 (quoting *Ley Organica del Servicio Exterior Mexicano y su Reglamento*, Art. 88).

Monitoring Proceedings and Incarceration: Consuls also can play an essential role in monitoring proceedings against the national to ensure fairness and compliance with international standards and monitor the pre- and post-trial conditions of incarceration. For example, the United States requires its consuls to monitor the well being of incarcerated American citizens, protest discrimination against detained citizens, and attend the trial of any American, even in the absence of discrimination, *see* Lee, *supra*, at 169-71 (quoting Dep't. of State, *Consular Instructions* 421.3,

431.2, 431.3), and the United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prima-facie miscarriage or denial of justice" or "the futility of appeal to a higher authority." Lee, *supra*, at 125 (quoting *United Kingdom Foreign Service Instructions* VIII-16 (vi)). Consuls cannot perform the monitoring function unless they know of the proceedings against a national. In most cases, they will become aware of those proceedings only when the Vienna Convention is complied with by authorities of the Receiving State.

Moreover, the monitoring function does not exist simply to provide comfort or reassurance to the accused foreign national. Rather, it increases the chances that the defendant will receive a truly fair trial. The possibility of discrimination is substantial in a proceeding against a foreign national, especially in a capital cases. *See* Shank & Quigley, *supra*, at 741. Consular monitoring and presence during the course of proceedings can reduce the possibility of discrimination. *See id.* at 744. Thus, an accused foreign national can suffer substantial harm, in the form of discrimination, when a consul is not monitoring the proceedings. That harm is suffered in every case where authorities fail to comply with the Vienna Convention, because those cases will not have any monitoring of the proceedings to ensure the absence of discrimination.

VI.
CONCLUSION

As the United States has itself emphasized, the continuing vitality of the Vienna Convention depends upon reciprocity among its signatories. Therefore, violations of Article 36 by state officials undermine treaty provisions that form a cornerstone of consular relations and that are essential to the fair treatment both of foreign nationals detained in this country and of United States citizens who are detained abroad. Yet in the face of an admitted violation of Article 36, committed in the gravest of cases — one in which a political subdivision of the United States seeks to put a foreign national to death — the Fourth Circuit has ruled that it can afford no relief either to the accused or to Paraguay, his nation of origin.

Because violations of Article 36's notice provisions typically come to light only after an accused has been convicted and sentenced — as did the violation here — the Fourth Circuit's interpretation of the Eleventh Amendment means that federal courts will virtually always be powerless to remedy Article 36 violations. Yet it is to the federal courts that sovereign nations must be able to turn effectively to redress violations of their rights under Article 36. No less a document than the United States Constitution charges the federal courts with the responsibility for such cases. *See* U.S. Const., Art. 3, § 2 (judicial power of federal courts extends to cases arising under United States' treaties); *see also* 28 U.S.C. § 1331 (same). While foreign sovereigns might choose to bring state court actions to redress violations of the Vienna Convention, it would be an odd result indeed if foreign nations — complaining of the violation of rights arising under a treaty ratified by the President with the advice and consent of the Senate, enforced by federal regulation, and repeatedly invoked by the State Department in the conduct of this nation's foreign affairs — must resort to courts of the state whose officials have perpetrated the treaty violation.

The consular notice provisions of Article 36 confer rights that both the United States and amici view as being of the highest order. The Fourth Circuit's decision, closing the doors of the federal courts to sovereign nations complaining of Article 36 violations, effectively sanctions recurring violations of the Vienna

Convention that threaten to undermine its continuing vitality. The decision below, viewed in light of the reciprocal nature of Article 36 and its fundamental significance for the conduct of foreign relations, therefore raises "important question[s] of federal law that [have] not been, but should be, settled by this Court," Sup. Ct. R. 10(c). Amici accordingly urge this Court to grant Paraguay's Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

DATED: Los Angeles, California
March 26, 1998

Respectfully submitted,

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No. 97-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v.—

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE FOR THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION and THE LAWYERS COMMITTEE FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Vienna Convention on Consular Relations, a duly signed and ratified treaty obligation, is binding upon state and local law enforcement officials?

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INTERESTS OF THE *AMICI CURIAE*

This *amicus* brief is respectfully submitted jointly by the Human Rights Committee of the American Branch of the International Law Association and the Lawyers Committee for Human Rights.[1]

The Human Rights Committee of the American Branch of the International Law Association (hereinafter "Human Rights Committee") is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically, human rights law.[2] Members of the Committee have taught subjects such as international law, human rights law, foreign relations law, and constitutional law and have written extensively in these fields. They have litigated cases at the trial and appellate court levels, including the Supreme Court. In the past, members of the Committee have testified before the Foreign Relations Committee of the United States Senate and have submitted reports on a variety of issues including human rights and international law. The Human Rights Committee has a longstanding interest in the progressive development of international human rights law. It is committed to the international legal order, the rule of law and the protection of fundamental human rights.

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[1]All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No person or entity, other than *amici*, their members or counsel, have made a monetary contribution to the preparation or submission of the brief.

[2]The Human Rights Committee is one of a number of committees of the American Branch of the International Law Association. The American Branch is one of 40 branches of the International Law Association. The views expressed herein represent only those of the Human Rights Committee of the American Branch of the International Law Association. Not all members of the Committee participated in the preparation of this *amicus* brief.

The Lawyers Committee for Human Rights (hereinafter "Lawyers Committee") was established in 1978 and is the largest legally focused non-governmental human rights organization in the United States. Its work is impartial, holding all governments including the United States to the standards set forth in the International Bill of Rights and advocating for domestic implementation of international human rights law. Working in close collaboration with volunteer attorneys throughout the United States and lawyers and human rights advocates in other countries, the Lawyers Committee seeks to develop legal principles and to build legal institutions and structures that will guarantee human rights in the long term. The Lawyers Committee testifies before Congress and regularly consults with the Department of State, the National Security Council and various administrative agencies to ensure that the United States complies with its obligations under international human rights treaties. The Lawyers Committee also participates in litigation, most often as amicus curiae, to provide expert legal analysis on important aspects of international human rights and refugee law.

The *amici* are deeply concerned by the consistent disregard of the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (hereinafter "Vienna Convention") by the Commonwealth of Virginia as well as other states.[3] The *amici* are also troubled by the Fourth Circuit's refusal

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[3] This case also involves the 1859 Treaty of Friendship, Commerce and Navigation between the United States and Paraguay, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091. The Treaty of Friendship contains a most-favored nation clause with respect to consular and diplomatic agents. Article XII provides that "the Diplomatic Agents and Consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions and immunities are, or may be, granted to Agents of any other Nation whatever." Under the terms of the most-favored nation clause, both countries gain the benefits of other consular agreements which may contain more favorable provisions. While this

(continued...)

to act upon these violations. The failure of state officials to comply with the obligations set forth in the Vienna Convention has given rise to several complaints by foreign governments against the United States in international tribunals.[4] Violations have also given rise to lawsuits by foreign governments against individual states in U.S. courts.[5] It is precisely these sorts of consequences that the Framers of the Constitution sought to avoid by recognizing the importance of treaties in our constitutional scheme. Compliance with international obligations cannot be held hostage to the parochial interests of the states. Indeed, the primacy of treaty obligations over inconsistent state practice has long been recognized by the Supreme Court.

Consular access serves an integral role in the protection of human rights, including due process rights. Foreign nationals, who are often unfamiliar with the language, culture or legal system of the detained state, benefit from prompt communication with consular officials. At the same time, foreign governments are able to monitor the safety and fair treatment of their nationals. Thus,

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(...continued)
brief focuses on the Vienna Convention, the arguments made throughout the brief apply with equal force to the Treaty of Friendship.

[4] *See* Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Carlos Santana, Case 11.130, Inter-Am. C.H.R. (Mar. 11, 1993); Individual Complaint to the Inter-American Commission on Human Rights Against the United States of America on Behalf of Cesar Fierro, Case 11.331, Inter-Am. C.H.R. (July 21, 1994).

[5] In addition to the present case, the Mexican government initiated a lawsuit against Arizona officials due to their failure to comply with the Vienna Convention on Consular Relations. *United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997) *pet. for cert. filed* (Feb. 18, 1998)(No. 97-1365).

consular access ensures that foreign nationals in all countries are treated fairly and without prejudice to their nationality.

Failure to abide by these well-established principles will have a deleterious effect on U.S. foreign policy interests as well as the safety of U.S. citizens abroad. It also raises serious questions about the U.S. commitment towards the rule of law. For these reasons, the *amici* have respectfully filed this amicus brief and urge the Court to grant review.

SUMMARY OF ARGUMENT

This case involves the Vienna Convention on Consular Relations and its application in the United States. The United States has signed and duly ratified the Vienna Convention. The treaty and its provisions on consular access have been recognized to be self-executing. Under the Supremacy Clause of the United States Constitution and based upon well-established Supreme Court precedent, such treaty obligations are binding in the United States and take precedence over inconsistent state law and practice.

ARGUMENT

I. THE VIENNA CONVENTION ON CONSULAR RELATIONS ESTABLISHES A FOREIGN NATIONAL'S RIGHT TO CONSULAR ACCESS

The importance of consular relations has long been recognized. Indeed, its roots can be traced back to the city-states of ancient Greece. Luke Lee, CONSULAR LAW AND PRACTICE 3-7 (2nd ed. 1991). As an effective political institution, however, the consul did not truly develop until the dawning of the commercial age during the Middle Ages. Gradually, nation-states began entering consular agreements to regulate consular relations. By the twentieth century, consular agreements had been adopted by most countries.

It was not until 1963 that the rules and norms on consular relations were formally codified. On April 24, 1963, the United

Nations Conference on Consular Relations adopted the Vienna Convention on Consular Relations and two optional protocols. The Vienna Convention entered into force on March 19, 1967. According to its Preamble, the Vienna Convention was established to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." The Preamble adds that the purpose of consular privileges and immunities is "to ensure the efficient performance of functions by consular posts on behalf of their respective states."

The Vienna Convention defines and guarantees consular rights, privileges and duties. Article 5 of the Convention lists a number of consular functions. These cover a wide variety of responsibilities including: furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state; issuing passports and travel documents; serving as a notary and civil registrar; transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state; and exercising rights of supervision and inspection of vessels and aircraft of the sending state. One of the most important responsibilities of the consul is to protect the nationals of the sending state. Accordingly, Article 5(e) provides that consular functions include "helping and assisting nationals, both individuals and bodies corporate, of the sending State."

The Vienna Convention recognizes that communication is essential for facilitating the exercise of consular functions relating to nationals of the sending state. Accordingly, Article 36(1)(a) provides that consular officials shall be free to communicate with, and have access to, nationals of the sending state. Similarly, nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state.

A particularly sensitive issue arises when a national is detained by the receiving state. Article 36(1)(b) provides that the competent authorities of the receiving state shall, without delay,

inform a national of his right to notify the consular post that he has been detained:[6]

> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

Article 36(1)(c) grants consular officers the right to visit, converse and correspond with a national who is in detention and to arrange for his legal representation:

> (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

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[6]Due to the most-favored nation clause contained in the Treaty of Friendship, there is also an affirmative obligation to notify consular officials when a foreign national is detained even if the foreign national makes no request for consular access.

Finally, Article 36(2) provides that the laws and regulations of the receiving state must enable full effect to be given to these rights:[7]

> The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Similarly, Article 14 declares that the receiving state shall "ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention."

Essentially, consular access serves two functions. It serves the needs of foreign nationals who benefit from prompt communication with consular officials as well as their intervention during legal proceedings. It provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system. It also serves the needs of foreign governments. It enables foreign governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained nationals.

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[7]Prior to the approval of Article 36(2), the Soviet Union proposed an amendment which would have permitted a country's domestic law to impair the rights set forth in Article 36(1). According to the Soviet delegate, Article 36(2) could force states to alter their criminal laws and allow consular officials to interfere with the legal process in order to protect aliens. U.N. GAOR, Conference on Consular Relations, 12th Plenary Meeting, Agenda Item 10, para. 2-9, U.N. Doc. A/CONF.25/SR.12, 17 (1963), at 1. The amendment was defeated.

II. THE VIENNA CONVENTION RIGHT TO CONSULAR ACCESS APPLIES BOTH TO UNITED STATES CITIZENS ABROAD AND TO FOREIGN NATIONALS IN THE UNITED STATES

The United States signed the Vienna Convention on April 24, 1963. The Senate subsequently approved the Convention on October 22, 1969, and it was formally ratified by the President on November 12, 1969. The ratification was deposited on November 24, 1969, and it entered into force for the United States on December 24, 1969.

A. The United States Has Consistently Relied on the Vienna Convention to Protect Its Citizens Abroad

Following the adoption of the Vienna Convention by the United States, the State Department stressed the importance of consular access as codified in Article 36. In an October 1973 memorandum, the State Department noted that:

> [i]n the Department's view, Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly. Article 36, paragraph 1(b) requires the authorities of the receiving state to notify the consular post of the sending state without delay of the arrest or commitment of a national of the sending state, if that national so requests. While there is no precise definition of 'without delay,' it is the Department's view that such notification should take place as quickly as possible and, in any event, no later than the passage of a few days.

Dept. of State File L/M/SCA, *reprinted in* Arthur Rovine, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1974).

The State Department has regularly referred to the Vienna Convention when discussing the right of consular access with foreign governments.

For example, in 1975, two American citizens were detained by Syrian security forces. Despite repeated requests, Syrian officials refused U.S. consular officials access to the detained nationals. The State Department ordered the U.S. Embassy in Damascus to inform the Syrian government of the importance of consular access. Eleanor McDowell, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 249-250 (1975). According to the State Department, the right of consular access is well established under the Vienna Convention, customary international law, bilateral agreements between the United States and Syria and by humanitarian considerations. Dept. of State telegram 40298 to Embassy Damascus Feb. 21, 1975, *reprinted in* MCDOWELL, at 249-250. The State Department added that:

> The recognition of these rights is prompted in part by considerations of reciprocity. States accord these rights to other states in the confident expectation that if the situation were to be reversed they would be accorded equivalent rights to protect their nationals. The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals.

Id. at 250. Following its formal request to the Syrian government, American consular officials were granted proper access to the detained nationals. Embassy Damascus telegram 925 to Dept., March 10, 1975, *reprinted in* MCDOWELL, at 251.

In November 1979, following the seizure of the U.S. Embassy in Tehran and the detention of U.S. citizens, the United States instituted proceedings against Iran in the International Court of Justice (hereinafter "ICJ"). In its application to the ICJ, the United States noted that the Government of Iran had violated the

Vienna Convention by, *inter alia*, failing to allow U.S. consular personnel to communicate and contact detained U.S. nationals. In its Order of Provisional Measures of December 15, 1979, the ICJ acknowledged the importance of the Vienna Convention. It noted that:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and ensuring protection and assistance for aliens resident in the territories of other States; and whereas therefore the privileges and immunities of consular officers and consular employees, and the inviolability of consular premises and archives, are similarly principles deep-rooted in international law . . . .

Case Concerning United States Diplomatic and Consular Staff in Tehran (Request for the Indication of Provisional Measures), 1979 I.C.J. Rep. 7, 19-20 *reprinted in* 19 I.L.M. 139, 145-146 (1980). In its Final Judgment, the ICJ held that Iran had violated several international conventions, including the Vienna Convention, as well as customary international law. It called upon Iran to make reparations to the United States for these violations.

To ensure that consular access is upheld by foreign governments, the State Department has issued instructions to all Foreign Service posts regarding their obligation to protect detained U.S. citizens abroad. U.S. Dep't of State, FOREIGN AFFAIRS MANUAL (1980). Chapter 400 of the Foreign Affairs Manual concerns the arrest and detention of U.S. citizens abroad. The introduction notes that "one of the basic functions of a consular officer is to provide a 'cultural bridge' between the host community and the officer's own compatriots traveling or residing abroad. No one needs that cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail." 7 FOREIGN AFFAIRS MANUAL, at § 401.

The Foreign Affairs Manual recognizes that the Vienna Convention as well as numerous bilateral agreements require host governments to notify foreign nationals of their right to communicate with consular officials. *Id.* at § 402. "Article 36 of the Vienna Consular Convention provides that the host government must notify the arrestee without delay of the arrestee's right to communicate with the American consul." *Id.* at § 411.1.

In addition, the Foreign Affairs Manual recognizes an additional obligation found in numerous bilateral agreements to notify consular officials whenever a national is detained:

> In order for the consular official to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a United States citizen is arrested. Prompt notification is necessary to assure early access to the arrestee.

Id. at § 411. Indeed, the Foreign Affairs Manual adds that U.S. consular officials should file a formal protest whenever a host government fails to inform the consular officials of the arrest of a U.S. citizen within 72 hours of the arrest. *Id.* at § 415.4-1.

The Foreign Affairs Manual also describes the importance of prompt consular access to detained nationals. *Id.* at § 412. Access assures both the national and the host government of the serious interest of the U.S. government in the case. It allows consular officials to document potential instances of abuse. It also allows consular officials to provide detained nationals with information pertaining to the legal system of the host government and with a list of lawyers. Finally, it allows consular officials to ensure that detained nationals are treated fairly and without prejudice to their national origin. The Foreign Affairs Manual requires U.S. consular officials to file a formal protest whenever a host government fails to provide consular access to detained nationals. *Id.* at § 415.4-3.

B. The Vienna Convention Was Designed to Protect Foreign Nationals within the United States

The Vienna Convention also applies within the United States. Indeed, the federal government enacted regulations in 1967 to establish a uniform procedure for consular notification when nationals of foreign countries are arrested by officers of the Department of State or the Immigration and Naturalization Service. 28 C.F.R. § 50.5; 8 C.F.R. § 236.1. The regulations were enacted to implement the provisions on consular notification and access contained in existing bilateral consular agreements as well as the pending Vienna Convention.

The legislative history surrounding the Senate ratification of the Vienna Convention clearly indicates that the agreement was intended to apply in the United States and that it would not require further legislative action. Upon submitting the Vienna Convention to the Senate, the Executive branch indicated that the treaty was "entirely self-executive [sic] and does not require any implementing or complementary legislation." S. Exec. Rep. No. 91-9, 91st Cong., 1st Sess. 2 & 5 (appendix) (statement by J. Edward Lyerly, Deputy Legal Adviser) (1969).

In addition, the legislative history also indicates that the agreement was intended to affect federal, state and local law enforcement procedures. During Senate consideration of the Vienna Convention, Senator William Fulbright asked the Executive branch whether the agreement would affect federal legislation or state laws. *Id.* at 18. In response, the State Department indicated that "[t]he Vienna Convention does not have the effect of overcoming Federal or State laws beyond the scope long authorized in existing consular conventions. *Id.* It added, however, that "[t]o the extent that there are conflicts in Federal legislation or State laws the Vienna Convention, after ratification, would govern as in the case of bilateral consular conventions." *Id.* Moreover, the Senate fully recognized that state and local jurisdictions were required to provide consular notification when a foreign national was detained. *Id.* at 24. To better understand the impact of the Vienna

Convention on state and local jurisdictions, the Senate requested information from the Executive branch regarding the manner in which the State Department notifies state and local jurisdictions regarding consular agreements so that they know which consuls "to notify when they arrest a foreign national." *Id.*

In 1969, the Department of State began issuing notices to state and local law enforcement officials regarding the detention of foreign nationals. The notice is mailed to the governor and attorney general of each of the fifty states and mailed to the mayors of cities with populations exceeding 100,000 people. U.S. Dep't of State, *Notice for Law Enforcement Officials on Detention of Foreign Nationals* (1993). The notice provides in pertinent part:

> The U.S. Department of State wishes to remind all law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there may be legal obligation to notify diplomatic or consular representatives of that person's government in this country. Compliance with the notification requirement is essential to ensure that similar notice is given to U.S. diplomatic and consular officers when U.S. citizens are arrested or detained abroad.

Id. at 1. The notice then sets forth the obligations for law enforcement officials with respect to the detention of foreign nationals and the right of consular access. It provides that all detained nationals must be notified of their right to contact and communicate with consular officials. It indicates that this requirement is provided by the Vienna Convention and customary international law. In addition, the notice recognizes that the United States has entered bilateral agreements with certain countries that require notification of consular officials even if the alien requests that no such notification take place. Finally, the notice provides a current list of embassies and consulates in the United States, including their address and telephone number.

Despite the existence of these obligations, there appears to be a pervasive disregard of the Vienna Convention in the United States. Few states have heeded the state Department notice and the obligation on consular access. It is particularly troubling that a recent survey identified as many as 100 foreign nationals on death row who were never notified of their right to consular access. William Aceves, *Murphy v. Netherland*, 92 AM. J. INT'L L. 87, 90 (1998).

III. THE VIENNA CONVENTION IS THE SUPREME LAW OF THE LAND AND APPLIES TO FEDERAL, STATE AND LOCAL LAW ENFORCEMENT OFFICIALS

As a duly ratified and self-executing agreement, the Vienna Convention is the supreme law of the land and applies to federal, state and local law enforcement officials.

A. The Vienna Convention is the Supreme Law of the Land

It is well settled that international agreements of the United States are the law of the United States and supreme over the laws of the several states. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987) (hereinafter "RESTATEMENT (THIRD)"). Under the Supremacy Clause of the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Accordingly, courts are bound to give effect to international agreements. However, the Supreme Court has limited the application of treaty obligations within the United States. In *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829), the Supreme Court found that a treaty is only enforceable in U.S. courts if it does not require further congressional action or if Congress enacts legislation implementing the treaty provisions. "Our constitution

declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." In the *Head Money Cases*, 112 U.S. 580, 598-599 (1884), the Supreme Court stated that "[a] treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined." This principle has been affirmed on numerous occasions. *See also* RESTATEMENT (THIRD) § 111(3).

In addition to creating domestic obligations, treaties create international obligations. The United States is also responsible for complying with these obligations. International law provides that a state is obligated to comply with a treaty that has been ratified and has entered into force. This obligation is codified at Article 26 of the Vienna Convention on the Law of Treaties which provides that "[e]very treaty in force is binding upon the parties and must be performed by them in good faith." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969). Indeed, this principle represents one of the most important obligations in international law: *pacta sunt servanda* - treaties must be observed. RESTATEMENT (THIRD), at § 321 cmt. a. It is considered to be a *jus cogens* norm, a fundamental standard of conduct that cannot be set aside by treaty or acquiescence.

Moreover, a rule of international law or a provision of an international agreement that is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation. This principle of international responsibility is codified in Article 27 of the Vienna Convention on the Law of Treaties, which provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." It has also been recognized in our own legal system. As noted in the RESTATEMENT (THIRD), at § 115(1)(b), "that a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."

In sum, international agreements create both domestic and international obligations. It is necessary to recognize this distinction when examining the application of treaty obligations in the United States as well as the consequences that result from treaty violations.

B. The Vienna Convention Applies to State and Local Governments

Treaty obligations are not limited to the federal government. They also apply to state and local governments. Indeed, international agreements take precedence over inconsistent state laws under the Supremacy Clause.[8] This fundamental principle of federalism has been affirmed on numerous occasions by the Supreme Court.

In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), the Supreme Court examined the relationship between a treaty and state law. The Court determined that the Treaty of Peace between the United States and Great Britain took precedence over inconsistent state law. According to Justice Chase, "[t]he treaty of 1783 has superior power to the Legislature of any State, because no Legislature of any State has any kind of power over the Constitution, which was its creator." *Id.* at 237. Justice Chase went on to add that it was the responsibility of the judiciary, both federal and state, to uphold the treaty over inconsistent state law. *Id.*

In the seminal case of *Missouri v. Holland*, 252 U.S. 416, 431 (1920), the Supreme Court examined the validity of a treaty and subsequent implementing legislation against charges by Missouri that they were "an unconstitutional interference with the

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[8] The RESTATEMENT (THIRD) § 115 cmt. e indicates that "[e]ven a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy." *See also* Jordan Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 51-57, 62-64, 92 (1996).

rights reserved to the States by the Tenth Amendment," and that they threatened to "invade the sovereign right of the State and contravene its will manifested in statutes." The 1916 treaty between the United States and Great Britain sought to protect migratory birds traversing between the United States and Canada. Congress subsequently enacted legislation implementing the treaty, and regulations were promulgated soon thereafter by the Secretary of Agriculture. In a typically terse holding, Justice Holmes determined that the treaty and legislation were valid exercises of federal power. The opinion emphasized the important role played by the federal government in regulating matters of national concern. *Id.* at 435.

The Supreme Court's ruling in *United States v. Belmont*, 301 U.S. 324, 331 (1937) is also instructive. "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. . . ."

Indeed, international law recognizes the liability of the central government for violations of international law committed by any entity empowered to exercise governmental authority. Thus, the RESTATEMENT (THIRD), at § 321 cmt. b. provides that "[a] state is responsible for carrying out the obligations of an international agreement. A federal state may leave implementation to its constituent units, but the state remains responsible for failure of compliance." According to Sir Ian Brownlie, the law in this respect is well-settled. "A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the Legislature and other sources of internal rules and decision-making are not to be regarded as acts of some third party for which the state is not responsible, and any other principle would facilitate evasion of obligations." Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 35 (4th ed. 1990).

CONCLUSION

The Fourth Circuit's ruling is troubling because it prevents foreign governments from enforcing valid treaty obligations in U.S.

courts. The United States signed and duly ratified the Vienna Convention. It is undisputed that the Vienna Convention is self-executing. Despite the existence of clearly defined treaty obligations that set forth specific rights for consular officials, the actions of Virginia officials, combined with the rulings of the Fourth Circuit, have emasculated a self-executing treaty obligation and have ignored the Supremacy Clause.

Consular access is a fundamental right of due process designed to ensure the fair and impartial treatment of foreign nationals.[9] It serves the needs of foreign nationals who benefit from prompt communication with consular officials as well as their intervention during legal proceedings. Foreign nationals are at a distinct disadvantage when they are first detained by law enforcement officials. They are often unfamiliar with the language or culture of the detaining state. They are certainly unfamiliar with the legal system of the detaining state. As a result, they will not have the ability to fully understand what is taking place, particularly at the early stages of the legal process when it is essential to fully understand one's rights. Through prompt intervention, a consular official can provide a foreign national with critical information about their case and the legal process. Consular access enables foreign governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained persons. It is for these very reasons that the consular institution was created.

There are several reasons for ensuring that the United States fully complies with the obligations set forth in the Vienna Convention as well as in other consular agreements. Reciprocity plays an important role in international relations. As the Supreme Court noted in *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), "international law is founded upon mutuality and reciprocity."

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[9] The RESTATEMENT (THIRD) § 711, rpt. 2 indicates that the refusal of a government to allow a detained foreign national to communicate with government representatives is a denial of due process and gives rise to state liability under international law.

Indeed, the Executive branch has long noted the reciprocal nature of the obligations set forth in the Vienna Convention. In order to ensure proper treatment of U.S. nationals abroad, the United States must make comparable efforts at home. Otherwise, foreign governments will have little incentive in complying with these obligations. More broadly, failure to adhere to the obligations on consular access may lead to violations of other diplomatic and consular obligations such as diplomatic immunity. Effective diplomatic and consular relations are imperative for stable relations between states. Political and economic relations cannot fully develop without effective diplomatic and consular relations. Accordingly, proper compliance with the Vienna Convention as well as other consular and diplomatic agreements is essential as a practical matter.

The federal courts have consistently expressed a concern over the persistent violation of the Vienna Convention by the states and the long-term consequences of such action on U.S. interests abroad. Concurring in *Breard v. Pruett*, a companion case, Judge Butzner wrote:

> The protections afforded by the Vienna Convention go far beyond Breard's case. United States citizens are scattered about the world as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that "international law is founded upon mutuality and reciprocity . . . ." (citation omitted)
>
> . . . .The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation.

Breard v. Pruett, No. 96-25, slip op. at 11-12 (4th Cir. Jan. 22, 1998) (Butzner, J., concurring).

Quite simply, the United States signed and duly ratified the Vienna Convention. If the United States seeks to affirm and rely on the rule of law, it must fully implement its international obligations. It is up to the courts to ensure that these obligations are fulfilled.

March 24, 1998

Respectfully submitted,

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Lawyers Committee for Human Rights

A-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

Supreme Court, U.S.
FILED
1998
OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Dated: March 31, 1998

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IN THE

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OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
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Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
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ON PETITION FOR WRIT OF CERTIORARI TO
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APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the Fourth Circuit, petitioners the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States (collectively, "Paraguay"), respectfully submit this application for a stay

of the execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, or, in the alternative, an order enjoining respondent Virginia officials from carrying out the execution, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of this Court.

There is a reasonable probability that this Court will grant Paraguay's petition and a significant possibility that it will reverse the lower court's judgment. If Breard is executed before the Court rules, however, Paraguay will be irrevocably deprived of the opportunity to obtain any remedy for the conceded violation of the treaty rights it seeks to vindicate here. A stay or injunction should issue.

FACTS AND PRIOR PROCEEDINGS

Paraguay brought this action to protect its rights under the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention"), and the Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty") (together, the "Treaties"). Seeking relief under *Ex parte Young*, 209 U.S. 123 (1908), Paraguay alleges that by carrying out Breard's conviction and death sentence, Virginia officials are presently violating Paraguay's rights under the Treaties or, at a minimum, causing Paraguay to suffer continuing consequences from an earlier violation of the Treaties. The District Court held that Paraguay had standing to bring the suit, but dismissed the action for lack of subject matter jurisdiction on grounds of the Eleventh Amendment

and the *Rooker/Feldman* doctrine. *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996).

On January 22, 1998, the Court of Appeals affirmed the District Court's judgment on Eleventh Amendment grounds, holding that Paraguay did not allege an ongoing violation of federal law and did not seek prospective relief. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). The court stated, however, that it "shared the district court's expressed 'disenchantment' with the Commonwealth's conceded past violation of Paraguay's treaty rights" and noted the "disturbing implications in that conduct for larger interests of the United States and its citizens." *Id.* at 629.

Also on January 22, 1998, the Court of Appeals affirmed the District Court's dismissal of Breard's petition for a writ of habeas corpus, which rested in part on the Vienna Convention. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). On February 18, 1998, the Court of Appeals denied Breard's petition for rehearing and suggestion for rehearing en banc.

On February 20, 1998, Paraguay filed its petition for a writ of certiorari (the "Petition") in this Court. *Paraguay v. Gilmore*, No. 97-1390. The Petition was docketed on February 24.

On February 25, 1998, by an order attached hereto as Exhibit 1, the Arlington County Circuit Court, Commonwealth of Virginia, set April 14, 1998, as the date for Breard's execution.

On March 11, 1998, Breard filed a petition for a writ of certiorari. *Breard v. Pruett*, No. 97-8214. Paraguay understands that Breard recently filed an application for stay of execution with this Court.

By letter dated March 24, 1998, respondents advised the Clerk of this Court that they did not intend to file a response to the petition.

Today, March 31, 1998, by an order attached hereto as Exhibit 2, the Court of Appeals denied Paraguay's application for a stay of or injunction against Breard's execution.

REASONS FOR GRANTING THE STAY OR INJUNCTION

I.

THIS COURT SHOULD STAY OR ENJOIN THE EXECUTION BECAUSE PARAGUAY MEETS ANY APPLICABLE STANDARDS.

A. Paraguay Satisfies the Requirements for Granting a Stay In the Face of an Impending Execution.

A request for provisional relief, whether in the form of a stay or an injunction, pending the Supreme Court's consideration of a petition for certiorari calls into play the same equitable considerations. The applicant must demonstrate (a) a likelihood that irreparable harm will result if the interim equitable relief is not granted; (b) a reasonable probability that four Justices of the Court would consider that the case had sufficient merit to warrant granting a writ of certiorari; (c) a significant possibility of reversal of the lower court's decision; and (d) in appropriate cases, potential harm to

the applicant exceeding that to the respondent and the public interest favoring a stay. *See Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (temporary injunction); *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (temporary injunction); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (White, J., in chambers) (stay of execution); *Rosker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (stay of lower court mandate). *But see Turner Broadcasting System, Inc. v. Federal Communications Commission*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers) (applying different standard to request for injunctive relief denied by lower courts, on application to single Justice in chambers) (discussed in Part I.B below).

Paraguay so demonstrates here. *First*, the execution of Paraguay's national -- an act that would irrevocably eliminate any possibility of vindicating Paraguay's rights under the Treaties -- has now been set for April 14. The requirement "that irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring).

Second, there is a reasonable probability that this Court will grant Paraguay's petition for certiorari. Paraguay contends that the writ should be granted because (a) the Court of Appeals' holding eviscerates the consular notification provisions of the Vienna Convention, to which the United States itself attaches the highest importance, Petition at 10-16 (Part I); (b) the holding departs from settled

doctrine by imposing two new requirements on an *Ex parte Young* plaintiff seeking protection against the continuing consequences of even a completed violation of federal law, Petition at 16-21 (Part II); (c) this Court should review cases that fall within its original jurisdiction but arrive at the Court on a petition for certiorari where, as here, there are no factors outweighing the presumption that, in accord with the constitutional scheme, this Court should hear the case, Petition at 22-24 (Part III.A); and (d) the Framers intended this Court to review cases where a grant of relief might prevent an international law claim from moving to the international plane -- as here, by means of an application by Paraguay to the International Court of Justice, which would have compulsory jurisdiction over the application pursuant to the Optional Protocol to the Vienna Convention, Petition at 22, 25-29 (Part III.B).

For the reasons more fully set forth in the Petition, the Vienna Convention and *Ex parte Young* questions raised by the Fourth Circuit's decision and presented by the petition independently warrant granting the writ. Petition at 10-21. In this case, moreover, they arise in a case to which the Framers ascribed special importance. Because this case involves the rights of consuls under an international obligation of the United States, it falls within this Court's original jurisdiction. U.S. Const., art. III, § 2, cl. 2. Out of respect for the self-described limitations on this Court's role as a court of first instance, Paraguay chose to file first in the District Court. Now that the case has arrived on a petition for certiorari, however, the Court should grant the writ unless it can

> say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to . . . its other responsibilities.

Ohio v. Wyandotte Chem. Corp., 401 U.S. 493, 499 (1971) (application to exercise concurrent original jurisdiction).

The Court will not be able to say that here. Because this case arrives at the Court in the posture of a dismissal of a complaint and hence on a set of facts assumed to be true, it calls upon the Court's competence as an appellate tribunal. In addition, because of the prospect that, if not resolved in the United States courts, this case will become an international dispute subject to the compulsory jurisdiction of the International Court of Justice under the Optional Protocol to the Vienna Convention, it is precisely the kind of case that the Framers intended this Court in particular and the federal courts in general to resolve. Indeed, though it affirmed the District Court on a jurisdictional ground, the Court of Appeals recognized the critical international dimension to this case when it emphasized the importance of the Vienna Convention to its many signatories and the danger to United States interests if officials of this country do not comply with the Convention. *See Paraguay v. Allen*, 134 F.3d at 629 & n.7; *see also Paraguay v. Allen*, 949 F. Supp. at 1273; *Breard v. Pruett*, 134 F.3d at 622 (Butzner, J., concurring) ("freedom and safety [of American citizens] are seriously endangered if state officials fail to honor the Vienna Convention and other nations

follow their example"), *aff'g Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996) ("Virginia's persistent refusal to abide by the Vienna Convention troubles the Court."). Thus, this Court will likely grant the writ.

Third, there is a significant possibility that this Court will reverse the Court of Appeals' judgment by rejecting its holding on either or both of the Vienna Convention and *Ex parte Young* grounds. The narrow reading of the consular notification provisions of the Vienna Convention on which the court's *Ex parte Young* holding rests is inconsistent with the treaty text, the position the United States has itself expressed on other occasions, and the fundamental principle that treaties should be read to give effect to their purpose. Petition at 10-16 (Part I). Article 36 of the Vienna Convention is clearly intended to guarantee not merely *access*, but effective consular *assistance* to a detained foreign national. Consular assistance to a criminal defendant can only be effective if it is provided prior to and during trial -- the "main event," as this Court has emphasized, of a criminal prosecution. *McFarland v. Scott*, 512 U.S. 849, 859 (1994).

Further, the two new requirements that the Court of Appeals engrafted onto the continuing-consequences doctrine of *Ex parte Young* -- that the violation against the consequences of which plaintiff seeks protection be ongoing, and that the relief sought not "undo" the illegal conduct of which plaintiff complains -- are inconsistent with the very premises of that doctrine. Petition at 16-21 (Part II); *see, e.g., Milliken v. Bradley*, 433 U.S. 267 (1977). Contrary to the conclusion of the

Court of Appeals, the requirement of an ongoing violation does not bar suit so long as the *Ex parte Young* plaintiff seeks protection from the ongoing consequences of a violation of federal law. This Court's decision in *Milliken* so demonstrates: there "*the antecedent violation*" of de jure segregation was no longer ongoing, but relief was granted to "dissipate the continuing effects of *past misconduct*." 433 U.S. at 290 (emphasis added). Likewise, it simply cannot be said that Paraguay seeks "retrospective" relief when it asks the federal courts to stop an execution *that has not yet occurred.*

Fourth, the "stay equities" clearly favor granting the stay in this case. *California v. American Stores Co.*, 492 U.S. 1301, 1307 (1989) (O'Connor, J., in chambers); *United States Postal Service v. National Association of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers); *see also Rosker*, 448 U.S. at 1310-1311 (Brennan, J., in chambers). Whatever harm would be done the Virginia officials by a delay in executing Breard, there can be no doubt that, given the impending execution, the balance of hardships favors Paraguay. The "interests of the public at large" also counsel in favor of granting a stay, *Rosker*, 448 U.S. at 1308 (Brennan, J., in chambers), as the Court of Appeals emphasized the public interest in compliance with the Vienna Convention even while affirming the dismissal of Paraguay's case on jurisdictional grounds. 134 F.3d at 629 & n.7; *see also Breard v. Pruett*, 134 F.3d at 622 (Butzner, J., concurring).

B. Paraguay Also Satisfies the Alternative Standard for Granting An Interim Injunction Suggested by Some Justices.

Some individual Justices have expressed the view that a different standard applies to requests for interim relief depending upon whether the applicant seeks suspension of the effect of a judgment rendered below or protection against action about to be taken. *See Turner Broadcasting System, Inc. v. Federal Communications Commission*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v, NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). *But see Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (using standard applied in requests for stay discussed in Part I.A above to grant injunction); *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (Blackmun, J., in chambers) (same). These Justices divide requests to maintain the status quo into two categories: "a stay, which temporarily suspends 'judicial alteration of the status quo,' [and] an injunction [which] 'grants judicial intervention that has been withheld by the lower courts.'" *Turner Broadcasting System*, 507 U.S. at 1302 (quoting *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313)). According to these Justices, a single Justice should grant an injunction "only if (1) 'necessary or appropriate in aid of [the Court's] jurisdiction,' 28 U.S.C. § 1651(a), and (2) the legal rights at issue are 'indisputably clear.'" *Turner Broadcasting System*, 507 U.S. at 1303; *Ohio Citizens for Responsible Energy*, 479 U.S. at 1313.

The Court need not resolve on this application any conflict between the standard articulated in these decisions and that discussed in Part I.A. *First*, the decisions distinguishing between a stay and an injunction appear to be rooted in the limited authority of a Circuit Justice to act for the full Court. *See id.* ("The Circuit Justice's injunctive power is to be used sparingly and only in the most critical and exigent circumstances") (internal quotations omitted); *see also Turner Broadcasting System*, 507 U.S. at 1303 (where "single member of the Court is asked to delay the will of Congress to put its policies into effect at the time it desires," utmost circumspection is appropriate) (internal quotation omitted). Given that sufficient time remains before the scheduled execution, Paraguay understands that, under the Court's operating procedures, this application will be referred for consideration by the full Court. A standard calibrated to reflect the exceptional instances in which a single Justice must act on behalf of the Court should not constrain the authority of the full Court.

Second, Paraguay's application meets the requirements of even the alternative standard. Enjoining the execution of Breard is clearly necessary in aid of the Court's jurisdiction, because if the execution is not enjoined, the Petition will no longer rest on a live case or controversy, this action will be mooted, and the Court will lack jurisdiction. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J. concurring) ("the Court ordinarily should not permit an execution to moot [its] consideration of a case that [it] had agreed, or probably would agree, to hear on the

merits"). In addition, given the "conceded . . . violation" of the Vienna Convention, *Paraguay v. Allen*, 134 F.3d at 629, and for the reasons discussed at length in the Petition, the legal rights at issue in this case are "indisputably clear." *Turner Broadcasting System*, 507 U.S. at 1303 (internal quotation omitted).

Should the Court determine that it needs to resolve which of these two standards it should apply to Paraguay's application, it should hold that the standard discussed in Part I.A above governs all requests for an order maintaining the status quo pending consideration of a petition in this Court. The distinction between an injunction and a stay articulated by *Turner Broadcasting System* and *Ohio Citizens for Responsible Energy* reduces to whether the applicant won or lost in the lower courts. While the decisions of the Court of Appeals and the District Court are certainly relevant to assessing an application for an order maintaining the status quo, the weight of those decisions is amply accounted for by the *Barefoot* requirement that it be reasonably probable that four Justices will vote to grant the writ and significantly possible that five will vote to reverse on the merits. In cases meeting the *Barefoot* standard, an injunction maintaining the status quo necessarily is "appropriate in aid of [the Court's] . . . jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). In this case, for the reasons just discussed, such an order is also "necessary" in aid of the Court's jurisdiction. *Id.*

II.

NONE OF THE ADDITIONAL REASONS RESPONDENTS URGED IN THE COURT OF APPEALS COUNSEL AGAINST A STAY OR INJUNCTION.

In opposing Paraguay's motion for a stay or injunction in the Court of Appeals, respondents argued that (1) the relief Paraguay seeks is barred by *Gomez v. United States District Court*, 503 U.S. 653 (1992), and *Lonchar v. Thomas*, 517 U.S. 314 (1996); and (2) there is no reasonable prospect of reversal because Paraguay's suit is (a) barred by the *Rooker/Feldman* doctrine and (b) nonjusticiable. Appellees' Opposition to Appellants' Motion to Stay Angel Breard's Execution, served March 25, 1998 ("Stay Opp.") (attached as Exhibit 3 to this application), at 3-8. None of these arguments has merit.[1]

A. *Gomez* and *Lonchar* Are Inapposite.

Paraguay does not now and has never purported to "speak for Breard." Stay Opp. at 4. Paraguay did not file a petition for habeas corpus, and it does not purport to speak as Breard's "next friend" or in any other derivative capacity. To the contrary, Paraguay brings this action to vindicate *its own rights* under the Vienna

1. In light of the issues raised by respondents in opposing Paraguay's application in the Court of Appeals, Paraguay also attaches its own brief to the Court of Appeals ("Paraguay Br."), respondents' opposition brief ("Appellees' Br."), the brief *amicus curiae* of the United States on the justiciability issue ("U.S. Br."), Paraguay's reply brief ("Paraguay Reply"), and the brief *amicus curiae* of a group of international law professors ("Int'l Law Br.") on the justiciability issue as Exhibits 4 through 8, respectively.

Convention and Friendship Treaty. Pet. App. A40-A57 (Complaint); *see, e.g.*, *Paraguay v. Allen*, 134 F.3d at 626 (Paraguay's claim "based directly upon Paraguay's treaty rights"); U.S. Br. at 23-24 ("Paraguay is not seeking to invoke a habeas remedy on behalf of Breard; Paraguay has made clear instead that it is suing solely in order to vindicate its own rights under treaties with the United States").

Because Paraguay is not Breard and does not purport to speak on his behalf, this Court's decision in *Gomez*, the statement about *Gomez* in *Lonchar* on which respondents rely, and the series of orders respondents cite are simply inapposite. Stay Opp. at 3-5. According to respondents, this Court made clear in *Gomez* "that a suit under 42 U.S.C. § 1983 cannot be employed to obtain a stay of execution that would be precluded under the rules governing successive federal habeas petitions." Stay Opp. at 3. The plaintiff in *Gomez*, however, was a prisoner who could bring a habeas petition and, indeed, had already brought four of them. 503 U.S. at 653. By contrast, Paraguay, to state the obvious, is not in custody; it could not have sought relief on its own behalf by way of habeas; and it therefore cannot be denied relief on the basis of "rules governing successive federal habeas petitions" that its action cannot possibly implicate.

There is no easy way even to analogize Paraguay's action to a successive habeas petition. If an analogy could be drawn, however, Paraguay's suit -- the first action it brought seeking the requested relief -- would have to be treated as a first habeas petition, which general equitable principles cannot bar. *Lonchar*, 517 U.S. at

328-29. Moreover, far from engaging in "abusive delay" or "last-minute attempts to manipulate the judicial process," *Gomez*, 503 U.S. at 654; *see Lonchar*, 517 U.S. at 338 (Rehnquist, C.J., concurring in the judgment), Paraguay has moved diligently at every stage of this litigation, including filing its petition in this Court two months early and before Breard's execution date had even been set. Whatever the import of *Gomez* and *Lonchar*, they have no application here.

B. Paraguay's Suit Is Not Barred by *Rooker/Feldman*.

In opposing Paraguay's application for a stay or injunction in the Court of Appeals, respondents relied on the *Rooker/Feldman* doctrine to contend that the "lower federal courts . . . have no jurisdiction to conduct what is, in effect, a direct review of the State court criminal judgment against Breard." Stay Opp. at 7; *see also* Appellees' Br. at 14-17. Without citing or discussing *Johnson v. De Grandy*, 512 U.S. 997 (1994), the District Court relied on *Rooker/Feldman* as an alternative ground of dismissal. *Paraguay v. Allen*, 949 F. Supp. at 1273 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)). The Court of Appeals did not address the issue. *Paraguay v. Allen*, 134 F.3d at 626 & n.4.

In *Johnson*, this Court rejected the precise argument respondents make here -- and needed only a paragraph to do so. 512 U.S. at 1006; *see* Paraguay Br. at 22-26; Paraguay Reply at 4-7. There, defendant Florida officials argued that *Rooker/Feldman* barred the United States' challenge under the Voting Rights Act to a redistricting plan that the Florida Supreme Court had upheld in an action to which the

United States was not a party. Holding that *Rooker/Feldman* does not apply where the federal plaintiff "was not a party in the state court" and thus "was in no position to ask [the Supreme Court] to review the state court's judgment," this Court rejected the argument. 512 U.S. at 1006.

Likewise here, Paraguay was not and could not have been a party in the criminal prosecution of Breard, and it could not have taken an appeal from the conviction and sentence or ultimately sought review in this Court. If *Rooker/Feldman* did not bar the United States' suit in *Johnson* even though a favorable outcome would have effectively nullified the Florida Supreme Court's judgment, Paraguay's suit is not barred here regardless of its effect on Breard's conviction and sentence. 512 U.S. at 1006; *see* Paraguay Br. at 22-26; Paraguay Reply at 4-7.

C. Paraguay's Action Is Justiciable.

In opposing Paraguay's application for a stay or injunction in the Court of Appeals, respondents also argued that Paraguay's action raises "non-justiciable 'political questions.'" Stay Opp. at 7-8; *see also* Appellees' Br. at 21-22; U.S. Br. at 11-23. The District Court held, to the contrary, that Paraguay could bring an action for breach of the Treaties. *Paraguay v. Allen*, 949 F. Supp. at 1274; *see also* Paraguay Reply at 8-22; Int'l Law Br. at 3-12. The Court of Appeals did not address justiciability. *Paraguay v. Allen*, 134 F.3d at 626 & n.4.

The District Court was plainly correct in concluding that Paraguay's action for violation of a treaty is justiciable. As the United States conceded to the

Court of Appeals, this Court squarely so held in *Wildenhus's Case*, 120 U.S. 1, 17 (1887) ("[W]e see no reason why [the Belgian consul] may not enforce his rights under the treaty by writ of habeas corpus in any proper court of the United States."); *see* U.S. Br. at 21; *see also* Pet. at 9 n.3; Paraguay Reply at 13-14. The United States was also careful in the Court of Appeals not to question the right of sovereigns to sue to vindicate legal rights generally, *see* U.S. Br. at 22 (citing *Pfizer, Inc. v. India*, 434 U.S. 308 (1978)); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), yet it provided no principled ground on which to carve out a suit on a treaty -- an instrument that accords legal rights to the sovereign as such. U.S. Br. at 22-23. Nor did the United States attempt to square the position it articulated in the Court of Appeals with its *amicus*-support of the sovereign plaintiff in *Argentina v. New York*, 250 N.E.2d 698 (N.Y. 1969), a suit brought to enforce consular rights under pre-Vienna Convention customary international law.

Indeed, of all the cases upon which the United States relied in the Court of Appeals in support of the proposition that a sovereign may not sue on a treaty, only one actually involved a suit by a sovereign, and in that case the court did not question the sovereign's right to sue. *Compare* U.S. Br. at 11-23 *with* Paraguay Reply at 16-20. The United States placed principal reliance on *The Head Money Cases*, 112 U.S. 580, 597-98 (1884), but simply misconstrued the holding of that case and the rule for which it stands. In *The Head Money Cases*, this Court held that, because United States law accords equal dignity to a treaty and a federal statute, a court in the United States must

give effect to a subsequently enacted federal statute even if enforcement of the statute would cause the United States to violate an earlier treaty and hence give rise to the "international negotiations and reclamations" to which the Court referred. Stay Opp. at 7 (quoting 112 U.S. at 598); *see* Restatement (Third) of Foreign Relations Law of the United States § 115 & reporter's note 1 (1987). Here, however, far from suggesting that any subsequent congressional enactment has vitiated the effect of the Vienna Convention or diminished its status as the supreme law of the land, the United States and the lower courts have emphasized the vitality of the Convention and its importance to United States' interests. *See* U.S. Br. at 1, 23; *Paraguay v. Allen*, 134 F.3d at 629 & n.7; *Paraguay v. Allen*, 949 F. Supp. at 1273; *see also Breard v. Pruett*, 134 F.3d at 622 (Butzner, J., concurring), *aff'g Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996). Thus, the rule of *The Head Money Cases* is inapposite here. *See* Paraguay Reply at 16-20; Int'l Law Br. at 5-7.

Finally, respondents find no support in the modern political-question doctrine. By this action, Paraguay asks a federal court to order state officials to comply with two treaties made by the President and consented to by the Senate. Such an order could not possibly encroach upon the powers allocated to the political branches on the federal level. *See Baker v. Carr*, 369 U.S. 186, 210 (1962) ("it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question'"); Paraguay Reply at 20-22.

CONCLUSION

For the foregoing reasons, Paraguay respectfully requests that this Court grant (a) a stay of execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of the Court, or (b) in the alternative, an order temporarily enjoining respondent Virginia officials from carrying out the execution subject to the same terms.

Dated: March 31, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald Francis Donovan, Counsel of Record for Petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, hereby certify under penalty of perjury that all parties required to be served with the petition for certiorari by the Rules of the Supreme Court of the United States have been served. On March 31, 1998, I caused a copy of the Application for Stay of or Injunction Against Execution Pending Disposition of Petition for Writ of Certiorari to be served by Express Mail of the United States Postal Service upon each of the following:

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EDITOR'S NOTE

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A-738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION

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Dated: April 10, 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the Fourth Circuit, petitioners the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States, respectfully urge as an additional ground in support of their pending application for a stay of or injunction against the impending execution that on April 9, 1998, the International Court of Justice issued an order indicating provisional measures

directing that the United States of America ensure that Paraguay's national, Angel Francisco Breard, not be executed pending resolution of Paraguay's case against the United States.

It is critical to the rule of law for which the United States has stood since its founding that the ICJ's order be respected and implemented. Indeed, given the position of the United States in the world today, it is inconceivable that the United States would not comply. It would be fully appropriate for this Court, given its role in upholding the rule of law in this country, to serve as the organ of the United States by which the ICJ's order is given effect.

STATEMENT OF RELEVANT PROCEEDINGS SINCE THE FILING OF THE APPLICATION

On April 3, 1998, the Republic of Paraguay instituted proceedings in the International Court of Justice against the United States, claiming that by failing to notify its national, Angel Francisco Breard, of his right to contact the Paraguayan consulate at the time of his arrest on suspicion of capital murder, officials of the Commonwealth of Virginia had violated the Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77. Paraguay sought, among other remedies, *restitutio in integrum*, or the restoration of the situation that had existed prior to the unlawful act or omission. *See, e.g.*, Chorzów Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Judgment (Indemnity) of Sept. 13). In conjunction with its application instituting proceedings, Paraguay requested that the ICJ indicate provisional

measures directing the United States to ensure that Mr. Breard not be executed during the pendency of the proceedings.

On the same day, the ICJ scheduled a hearing on the request for provisional measures for Tuesday, April 7. By letter to the Clerk of this Court dated April 5, 1998, Paraguay lodged copies of its application instituting proceedings and its request for provisional measures.

On the scheduled date, the ICJ, all fifteen judges sitting, heard argument on Paraguay's request for provisional measures at the Peace Palace in The Hague. Yesterday, April 9, the Court issued a unanimous order that "the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order." Application of Vienna Convention on Consular Relations (Para. v. U.S.), No. 99 (Provisional Measures Order of Apr. 9, 1998). The order also stated that the Court would "ensure that any decision on the merits [would] be reached with all possible expedition." Judge Stephen M. Schwebel of the United States, the President of the Court, concurred in the order and issued a separate declaration, in which he stated that the provisional measures ordered "ought to be taken to preserve the rights of Paraguay in a situation of incontestable urgency." The Court's order and the separate declarations are attached to this memorandum as Exhibit A.

Proceedings in the ICJ now commence pursuant to its Order, also dated April 9, 1998, scheduling the filing of the memorials of Paraguay and the United States for June 9 and September 9, respectively. If this Court were to grant Paraguay's petition, the parties would have an opportunity to consider whether a suspension of the ICJ proceedings would be appropriate. *See* Petition at 28 n.18; *cf.* Interhandel (Switz. v. U.S.), 1959 I.C.J. 6 (Preliminary Objections Order of March 21) (dismissing diplomatic protection proceedings after grant of writ of certiorari by this Court).

I.

THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IS BINDING UPON THE UNITED STATES, AND THIS COURT SHOULD GIVE IT EFFECT.

The International Court of Justice is "the principal judicial organ of the United Nations." U.N. CHARTER, art. 92. As a principal organ of the United Nations, the ICJ is equal to the Security Council and the General Assembly. *Id.*, art. 7. By subscribing to the United Nations Charter, the United States became a party to the Statute of the International Court of Justice. *Id.*, art. 93; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 903 cmt. c (1987).

Article 41 of the Statute of the Court provides that it "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Statute of the International Court of Justice, Oct. 24, 1945, arts. 36, 41, 59 Stat. 1055. While the ICJ has not itself ruled whether an order indicating provisional measures is binding on the parties, RESTATEMENT § 903 cmt. e (1987), there can be no serious question that it is.

First, pursuant to Article 94(1) of the United Nations Charter, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." In turn, in a standard and oft-repeated formulation, the ICJ has explained that

> the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings . . . .

Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22). In other words, the authority to indicate provisional measures is intended to ensure that the Court remains in a position to render a meaningful judgment. Even were an order indicating provisional measures not regarded as a "decision" requiring compliance under the Charter, an agreement to comply with the judgment of a court cannot be squared with the latitude to deprive the court of its ability to render an effective judgment by disregarding a provisional order intended to preserve the rights subject to such a judgment. Hence, by agreeing to abide by the decision of the ICJ in this case, the United States has also agreed to abide by an order indicating provisional measures intended to ensure the effectiveness of any such decision. *E.g.*, Vienna

Convention on the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

Second, as noted, the ICJ is "the principal *judicial* organ of the United Nations." U.N. CHARTER, art. 92 (emphasis added). It is intrinsic to the very definition of a court that a party subject to its jurisdiction must comply with its orders, decisions, and rulings. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). As Judge Sir Gerald Fitzmaurice stated in his separate opinion in the *Northern Cameroons Case*, explaining why provisional measures must be binding:

> Although much . . . of [the ICJ's] incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court -- or any court of law -- being able to function at all.

(Cameroon v. U.K.) 1963 I.C.J. 15, 103 (Interim Protection Order of Dec. 2) (separate opinion of Judge Fitzmaurice). To similar effect, the Iran-United States Claims Tribunal, sitting in Full Tribunal and with the concurrence of all three United States Members, has held that it "has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective." *E-Systems, Inc. v. Islamic Republic of Iran*, Award No. ITM 13-338-FT (Feb 4), 2 Iran-U.S. CTR 51, 57 (1983); *see also* MANLEY OTTMAR HUDSON, THE PERMANENT COURT OF

INTERNATIONAL JUSTICE, 1920-1942, 426 (1943) ("a State is under an obligation to respect the Court's indication of provisional measures").

Finally, pursuant to the Supremacy Clause, the United States' international obligations form part of "the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. It is plainly the function of this Court both to state that law and to ensure compliance by state officials with that law. *E.g.*, *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Cooper*, 358 U.S. at 18-19. In particular, state interests cannot override federal authority in the area of foreign relations. *United States v. Pink*, 315 U.S. 203, 234 (1942) (individual states "do[] not exist" for foreign relations purposes); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 304, 315-22 (1936) (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary); *see also Zschernig v. Miller*, 389 U.S. 429 (1968). Indeed, as a matter of international law, this Court, as a component of the judicial branch of the United States Government, has the capacity to engage the international responsibility of the United States and, correspondingly, the obligation to comply with the United States' international obligations. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility) ("Draft Articles").

This Court can and should effect the United States' compliance with the ICJ's order and hence with its international obligations by granting a stay of or injunction against the execution scheduled for April 14, 1998, pending resolution of Paraguay's proceedings against the United States in the International Court of Justice. The United States is responsible under international law for the acts of its constitutent entities. *See, e.g.*, Jiménez de Aréchaga, *International Responsibility*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW, 531, 557 (Max Sørensen, ed., 1968) ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); Draft Articles at 127. In any event, article 36 of the Vienna Convention expressly imposes its consular notification obligations on all "competent authorities" of the United States. Nevertheless, the Governor of the Commonwealth of Virginia has made clear that he will look to this Court to tell him whether he should comply with the ICJ order. *See, e.g.*, Frank Green, *Try to Stop Execution, U.S. Told*, RICHMOND TIMES DISPATCH (Apr. 10, 1998), p. A1, A12 ("Asked [Governor] Gilmore's reaction to the International Court's ruling, his spokesman, Mark A. Minor, said yesterday that 'the Governor will continue to follow the U.S. courts and the United States Supreme Court.'"). In its brief *amicus curiae* to the Court of Appeals, the United States confirmed that the federal courts may enforce compliance by state officials with the United States' international obligations. U.S. Br.

at 23 (Exhibit 6 to Application for Stay of or Injunction Against Execution (Mar. 31, 1998) (citing *United States v. Arlington*, 669 F.2d 925, 929-30 (4th Cir.) (suit by United States under Supremacy Clause to enforce treaty), *cert. denied*, 459 U.S. 801 (1982)). There is no reason to require the United States to initiate a new action in federal court when a stay or injunction could issue in this action, or to allow the Governor of Virginia to determine whether the United States will comply with the ICJ's order.

II.

FOR REASONS OF COMITY AND RESPECT FOR THE RULE OF LAW, THIS COURT SHOULD GIVE EFFECT TO THE DECISION OF THE INTERNATIONAL COURT OF JUSTICE IN THE EXERCISE OF EQUITABLE DISCRETION.

Regardless of the binding effect of the provisional measures indicated by the ICJ on their own terms, they form an independently adequate ground on which this Court should grant the application for a stay or injunction. The essence of equitable discretion is flexibility, and no factor carries as much weight in the exercise of that discretion than the public interest. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946). When the public interest is involved, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go

when only private interests are involved." *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946) (when "federal right for which the sole remedy is in equity" is asserted, federal courts "have the duty . . . , sitting as national courts throughout the country," to enforce the right based on principles of federal equity jurisprudence).

Here, the national interest lies in showing respect for a unanimous ruling of the International Court of Justice. As both the major force in international affairs and a nation long committed to the rule of law, the United States would advance the public interest by respecting a ruling of the principal judicial organ of the United Nations. As Judge Schwebel, President of the ICJ, stated in explaining his vote in favor of the order:

> It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Vienna Convention on Consular Relations (Para. v. U.S.) (Provisional Measures Order of Apr. 9, 1998) (Declaration of President Schwebel).[1] As Judge Schwebel

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1. Before his election to the Court in 1981, Judge Schwebel served as, among (continued...)

recognized, if the United States wishes to advance the rule of law, it must show respect for the rule of law even when -- indeed, especially when -- compliance poses "serious difficulties."

In the exercise of its equitable discretion, in the interest of the rule of law, and out of comity to the principal judicial organ of the modern international legal order, this Court should give effect to the order indicating provisional measures by staying or enjoining the execution of Mr. Breard pending resolution of Paraguay's proceedings in the International Court of Justice against the United States.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the original Application and the Reply in further support, Paraguay respectfully requests that this Court grant (1) a stay of execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of the Court, or in the alternative,

1. (...continued)
other things, Deputy Legal Advisor to the United States Department of State and Executive Director of the American Society of International Law. Pursuant to Article 32(1) of the Rules of the Court, Judge Schwebel, as a national of the United States, does not preside in Paraguay's proceeding against the United States.

an order temporarily enjoining respondent Virginia officials from carrying out the execution subject to the same terms, and (2) a stay of or injunction against the execution pending resolution of Paraguay's proceeding against the United States in the International Court of Justice.

Dated: April 10, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald Francis Donovan, Counsel of Record for Petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, hereby certify under penalty of perjury that on April 10, 1998, I caused a copy of the Supplemental Application for Stay of or Injunction Against Execution to be served by first-class mail of the United States Postal Service upon and sent a copy also by telecopy to

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Dated: April 10, 1998
New York, New York

Donald Francis Donovan

General List No. 99

INTERNATIONAL COURT OF JUSTICE
9 April 1998

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS
(PARAGUAY v. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *Vice-President* **WEERAMANTRY**, *Acting President*; *President* **SCHWEBEL**; *Judges* **ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, HIGGINS, PARRA-ARANGUREN, KOOIJMANS, REZEK**; *Registrar* **VALENCIA-OSPINA**.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court,

Having regard to the Application filed in the Registry of the Court on 3 April 1998, whereby the Republic of Paraguay (hereinafter "Paraguay") instituted proceedings against the United States of America (hereinafter "the United States") for "violations of the Vienna Convention on Consular Relations [of 24 April 1963]" (hereinafter the "Vienna Convention") allegedly committed by the United States,

Makes the following Order:

1. Whereas, in its aforementioned Application, Paraguay bases the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes, which accompanies the Vienna Convention on Consular Relations ("the Optional Protocol");

2. Whereas, in the Application, it is stated that in 1992 the authorities of the Commonwealth of Virginia arrested a Paraguayan national, Mr. Angel Francisco **Breard**, whereas it is maintained that he was charged, tried, convicted of culpable homicide and sentenced to death by a Virginia court (the Circuit Court of Arlington County) in 1993, without having been informed, as is required under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, of his rights under that provision, whereas it is specified that among these rights are the right to request that the relevant consular office of the State of which he is national be advised of his arrest and detention, and the right to communicate with that office, and whereas it is also alleged that the authorities of the Commonwealth of Virginia also did not advise the Paraguayan consular officers of Mr. Breard's detention, and that those officers were only able to render assistance to him from 1996, when the Paraguayan Government learnt by its own means that Mr. Breard was imprisoned in the United States;

3. Whereas, in the Application, Paraguay states that Mr. Breard's subsequent petitions before federal courts in order to seek a writ of *habeas corpus* failed, the federal court of first instance having, on the basis of the doctrine of "procedural default", denied him the right to invoke the Vienna Convention for the first time before that court, and the intermediate federal appellate court having confirmed that decision, whereas, consequently, the Virginia court that sentenced Mr. Breard to the death penalty set an execution date of 14 April 1998, whereas Mr. Breard, having exhausted all means of legal recourse available to him as of right, petitioned the United States Supreme Court for a writ of *certiorari*, requesting it to exercise its discretionary power to review the decision given by the lower federal courts and to grant a stay of his execution pending that review, and whereas, while this request is still pending before the Supreme Court, it is however rare for that Court to accede to such requests; and whereas Paraguay stated, moreover, that it brought proceedings itself before the federal courts of the United States as early as 1996, with a view to obtaining the annulment of the proceedings initiated against Mr. Breard, but both the federal court of first instance and the federal appellate court held that they had no jurisdiction in the case because it was barred by a doctrine conferring "sovereign immunity" on federated states, whereas Paraguay also filed a petition for a writ of *certiorari* in the Supreme Court, which is also still pending, and whereas Paraguay furthermore engaged in diplomatic efforts with the Government of the United States and sought the good offices of the Department of State;

4. Whereas, in its Application, Paraguay maintains that by violating its obligations under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States prevented Paraguay from exercising the consular functions provided for in Articles 5 and 36 of the Convention and specifically for ensuring the

protection of its interests and of those of its nationals in the United States; whereas Paraguay states that it was not able to contact Mr. Breard nor to offer him the necessary assistance; and whereas accordingly Mr. Breard "made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation", and "did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay"; and whereas Paraguay concludes from this that it is entitled to *restitutio in integrum*, that is to say "the re-establishment of the situation that existed before the United States failed to provide the notifications . . . required by the Convention";

5. Whereas Paraguay requests the Court to adjudge and declare as follows:

> "(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by Articles 5 and 36 of the Vienna Convention;
>
> (2) that Paraguay is therefore entitled to ***restitutio in integrum***;
>
> (3) that the United States is under an international legal obligation not to apply to the doctrine of 'procedural default', or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and
>
> (4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;
>
> and that, pursuant to the foregoing international legal obligations,
>
> (1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;
>
> (2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and
>
> (3) the United States should provide Paraguay a guarantee of the non-repetition of the illegal acts";

6. Whereas, on 3 April 1998, after having filed its Application, Paraguay also submitted an urgent request for the indication of provisional measures in order to protect its rights, pursuant to Article 41 of the Statute of the Court and to Articles 73, 74 and 75 of the Rules of Court;

7. Whereas, in its request for the indication of provisional measures, Paraguay refers to the basis of jurisdiction of the Court invoked in its Application, and to the facts set out and the submissions made

therein; and whereas it reaffirms in particular that the United States has violated its obligations under the Vienna Convention and must restore the *status quo ante*;

8. Whereas, in its request for the indication of provisional measures of protection, Paraguay states that, on 25 February 1998, the Circuit Court of Arlington County, Virginia, ordered that Mr. Breard be executed on 14 April 1998; whereas it emphasizes that "[t]he importance and sanctity of an individual human life are well established in international law" and "[a]s recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law"; and whereas Paraguay states in the following terms the grounds for its request and the possible consequences of its dismissal:

> "Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favour";

9. Whereas Paraguay asks that, pending final judgment in this case, the Court indicate:

> "*(a)* That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;
>
> *(b)* That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph *(a)* immediately above and the results of those actions; and
>
> *(c)* That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case";
>
> and whereas it asks the Court moreover to consider its request as a matter of the greatest urgency "in view of the extreme gravity and immediacy of the threat that the authorities . . . will execute a Paraguayan citizen";

10. Whereas, on 3 April 1998, the Ambassador of Paraguay to the Netherlands addressed a letter to the President of the Court requesting the Court to fix an early date for a hearing on his Government's request for provisional measures, asking the Member of the Court who, in accordance with the provisions of Article 13, paragraph 1, and Article 32, paragraph 1, of the Rules of Court, would exercise the functions of President in the case to "call upon the United States of America to ensure that Mr. Breard is not put to death before the Court's ruling on Paraguay's request for provisional measures", and indicating that he had been appointed as Agent of Paraguay for the purposes of the case;

11. Whereas, on 3 April 1998, the date on which the Application and the request for provisional measures were filed in the Registry, the Registrar advised the Government of the United States of the filing of those documents, communicated the text of them to that Government by facsimile and sent it a certified copy of the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court and Article 38, paragraph 4, of the Rules of Court, together with a certified copy of the request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court; and whereas the

Registrar also sent the Government of the United States a copy of the letter addressed that day to the President of the Court by the Agent of Paraguay.

12. Whereas, by identical letters dated 3 April 1998, the Vice-President of the Court addressed both Parties in the following terms:

> "Exercising the functions of the presidency in terms of Articles 13 and 32 of the Rules of Court, and acting in conformity with Article 74, paragraph 4, of the said Rules, I hereby draw the attention of both Parties to the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects";

and whereas, at a meeting held the same day with the representatives of both Parties, he advised them that the Court would hold public hearings on 7 April 1998 at 10 a.m., in order to afford the Parties the opportunity of presenting their observations on the request for provisional measures;

13. Whereas, by a letter dated 5 April 1998, received in the Registry on 6 April 1998, the Ambassador of the United States to the Netherlands informed the Court of the appointment of an Agent and a Co-Agent of his Government for the case;

14. Whereas, pending the notification under Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, by transmission of the printed text, in two languages, of the Application to the Members of the United Nations and to other States entitled to appear before the Court, the Registrar, on 6 April 1998, informed those States of the filing of the Application and of its subject-matter, and of the request for the indication of provisional measures;

15. Whereas, on 6 April 1998, the Registrar, in accordance with Article 43 of the Rules of Court, addressed the notification provided for in Article 63, paragraph 1, of the Statute to the States, other than the Parties to the dispute, which on the basis of information supplied by the Secretary-General of the United Nations as depositary appeared to be parties to the Vienna Convention and to the Optional Protocol;

16. Whereas, at the public hearings held on 7 April 1998, in accordance with Article 74, paragraph 3, of the Rules of Court, oral statements on the request for the indication of provisional measures were presented by the Parties:

On behalf of Paraguay: by H. E. Mr. Manuel María Cáceres,
Mr. Donald Francis Donovan,
Mr. Barton Legum,
Dr. José Emilio Gorostiaga.

On behalf of the United States: by Mr. David R. Andrews,
Ms Catherine Brown,
Mr. John R. Crook,
Mr. Michael J. Matheson.

and whereas at the hearings a question was put by a Member of the Court, to which a reply was given orally and in writing;

* * *

17. Whereas, at the hearings, Paraguay reiterated the line of argument set forth in its Application and its request for the indication of provisional measures;

18. Whereas at the hearing, the United States argued that Mr. Breard's guilt was well established, and pointed out that the accused had admitted his guilt, which Paraguay did not dispute, whereas it recognized that Mr. Breard had not been informed, at the time of his arrest and trial, of his rights under Article 36, subparagraph 1 *(b)*, of the Vienna Convention, and indicated to the Court that this omission was not deliberate; whereas it nonetheless maintained that the person concerned had had all necessary legal assistance, that he understood English well and that the assistance of consular officers would not have changed the outcome of the proceedings brought against him in any way; whereas, referring to State practice in these matters, it stated that the notification provided for by Article 36, subparagraph 1 *(b)*, of the Vienna Convention is unevenly made, and that when a claim is made for failure to notify, the only consequence is that apologies are presented by the government responsible; and whereas it submitted that the automatic invalidation of the proceedings initiated and the return to the *status quo ante* as penalties for the failure to notify not only find no support in State practice, but would be unworkable;

19. Whereas the United States also indicated that the State Department had done everything in its power to help the Government of Paraguay as soon as it was informed of the situation in 1996, and whereas it stated that when, on 30 March 1998, Paraguay advised the Government of the United States of its intention to bring proceedings before the Court if the United States Government did not take steps to initiate consultation and to obtain a stay of execution for Mr. Breard, the Government of the United States had emphasized *inter alia* that a stay of execution depended exclusively on the United States Supreme Court and the Governor of Virginia;

20. Whereas the United States furthermore maintained that Paraguay's contention that the invalidation of the sentence of a person who had not been notified pursuant to Article 36, subparagraph 1 *(b)*, of the

Vienna Convention could be required under that instrument, has no foundation in the relevant provisions, their *travaux préparatoires* or the practice of States, and that, in the event, Mr. Breard has not been prejudiced by the absence of notification, and whereas it pointed out that provisional measures should not be indicated where it appears that the Applicant's argument will not enable it to be successful on the merits;

21. Whereas the United States also stated that, when the Court indicates provisional measures under Article 41 of its Statute, it must take the rights of each of the Parties into consideration and ensure that it maintains a fair balance in protecting those rights; whereas that would not be the case if it acceded to Paraguay's request in these proceedings, and whereas the measures requested by Paraguay would prejudice the merits of the case;

22. Whereas the United States finally alleged that the indication of the provisional measures requested by Paraguay would be contrary to the interests of the States parties to the Vienna Convention and to those of the international community as a whole as well as to those of the Court, and would in particular be such as seriously to disrupt the criminal justice systems of the States parties to the Convention, given the risk of proliferation of cases, and whereas it stated in that connection that States have an overriding interest in avoiding external judicial intervention which would interfere with the execution of a sentence passed at the end of an orderly process meeting the relevant human rights standards;

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• •

23. Whereas on a request for the indication of provisional measures the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, but whereas it may not indicate them unless the provisions invoked by the Applicant appear, prima facie, to afford a basis on which the jurisdiction of the Court might be founded;

24. Whereas Article I of the Optional Protocol, which Paraguay invokes as the basis of jurisdiction of the Court in this case, is worded as follows:

"Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol";

25. Whereas, according to the information communicated by the Secretary-General of the United Nations as depositary, Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, in each case without reservation;

26. Whereas Articles II and III of the aforementioned Protocol provide that within a period of two months after one party has notified the other of the existence of a dispute, the parties may agree to resort not to the International Court of Justice but to an arbitration tribunal or alternatively first to conciliation, but whereas these Articles

"when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the

compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention . . ." (*United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran), Judgment, 24 May 1980, I.C.J. Reports 1980*, pp. 25-26);

27. Whereas, in its Application and at the hearings, Paraguay stated that the issues in dispute between itself and the United States concern Articles 5 and 36 of the Vienna Convention and fall within the compulsory jurisdiction of the Court under Article I of the Optional Protocol; and whereas it concluded from this that the Court has the jurisdiction necessary to indicate the provisional measures requested;

28. Whereas at the hearing, the United States contended, for its part, that Paraguay had not established that the Court had jurisdiction in these proceedings, even prima facie; whereas it argued that there is no dispute between the Parties as to the interpretation of Article 36, subparagraph 1 *(b)*, of the Vienna Convention and nor is there a dispute as to its application, since the United States recognizes that the notification provided for was not carried out; whereas the United States maintained that the objections raised by Paraguay to the proceedings brought against its national do not constitute a dispute concerning the interpretation or application of the Vienna Convention; and whereas it added that there was no entitlement to *restitutio in integrum* under the terms of that Convention;

29. Whereas the United States moreover indicated to the Court that it had expressed its regret to Paraguay for the failure to notify Mr. Breard of his right to consular access, engaged in consultations with Paraguay on the matter and taken steps to ensure future compliance with its obligations under the Vienna Convention at both the federal and state level;

30. Whereas Paraguay asserts that it is nevertheless entitled to *restitutio in integrum*, that any criminal liability currently imposed on Mr. Breard should accordingly be recognized as void by the legal authorities of the United States and that the *status quo ante* should be restored in that Mr. Breard should have the benefit of the provisions of the Vienna Convention in any renewed proceedings brought against him, no objection to his continued detention meanwhile being made by Paraguay; whereas however the United States believes that these measures are not required by the Vienna Convention, would contravene the understanding underlying the adoption of Article 36 as well as the uniform practice of States, and would put this Court in a position of acting as a universal supreme court of criminal appeals;

31. Whereas there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Articles 5 and 36 thereof; and whereas this is a dispute arising out of the application of the Convention within the meaning of Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963;

32. Whereas the United States claimed nevertheless that prima facie there is no jurisdiction for the Court in this case as Paraguay has no legally cognizable claim to the relief it seeks nor any prospect ultimately of prevailing on the merits, because no prejudice to Mr. Breard has occurred;

33. Whereas the existence of the relief sought by Paraguay under the Convention can only be determined at the stage of the merits, and whereas the issue of whether any such remedy is dependent upon evidence of prejudice to the accused in his trial and sentence can equally only be decided upon at the merits;

34. Whereas the Court finds that, prima facie, it has jurisdiction under Article I of the aforesaid Optional Protocol to decide the dispute between Paraguay and the United States;

• •

35. Whereas the power of the Court to indicate provisional measures under Article 41 of its Statute is intended to preserve the respective rights of the parties pending its decision, and presupposes that irreparable prejudice shall not be caused to rights which are the subject of a dispute in judicial proceedings; whereas it follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by the Court to belong either to the Applicant, or to the Respondent; and whereas such measures are only justified if there is urgency;

36. Whereas the Court will not order interim measures in the absence of "irreparable prejudice . . . to rights which are the subject of dispute . . ." (*Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, p. 103; *United States Diplomatic and Consular Staff in Tehran, Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 19, para. 34);

37. Whereas the execution of Mr. Breard is ordered for 14 April 1998; and whereas such an execution would render it impossible for the Court to order the relief that Paraguay seeks and thus cause irreparable harm to the rights it claims;

38. Whereas the issues before the Court in this case do not concern the entitlement of the federal states within the United States to resort to the death penalty for the most heinous crimes; and whereas, further, the function of this Court is to resolve international legal disputes between States, *inter alia* when they arise out of the interpretation or application of international conventions, and not to act as a court of criminal appeal;

• •

39. Whereas, in the light of the aforementioned considerations, the Court finds that the circumstances require it to indicate, as a matter of urgency, provisional measures in accordance with Article 41 of its Statute;

40. Whereas measures indicated by the Court for a stay of execution would necessarily be provisional in nature and would not in any way prejudge findings the Court might make on the merits; and whereas the measures indicated would preserve the respective rights of Paraguay and of the United States; and whereas it is appropriate that the Court, with the co-operation of the Parties, ensure that any decision on the merits be reached with all possible expedition,

41. For these reasons,

THE COURT

Unanimously,

1. *Indicates* the following provisional measures:

The United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;

II. *Decides*, that, until the Court has given its final decision, it shall remain seised of the matters which form the subject-matter of this Order.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this ninth day of April, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Paraguay and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judges ODA and KOROMA append declarations to the Order of the Court.

(Initialled) C.G.W.

(Initialled) E.V.O.

A-736

(6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY IN SUPPORT OF APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Dated: April 2, 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1390

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
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REPLY IN SUPPORT OF APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, Chief Justice of the United States and Circuit Justice for the Fourth Circuit, petitioners the Republic of Paraguay, Jorge J. Prieto, as Ambassador of the Republic of Paraguay to the United States, and José María Gonzales Avila, as Consul General of the Republic of Paraguay to the United States (collectively, "Paraguay"), respectfully submit this reply in further support of Paraguay's application for a stay of the execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, or, in the alternative, an order enjoining respondent Virginia officials from carrying out the execution, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of this Court.

REASONS FOR GRANTING THE APPLICATION

The arguments advanced in Respondents'-Opposition, served April 1, 1998, are without merit. *First*, respondents err when they rely on *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). *See* Opp'n at 4. In *Preiser*, this Court held that federal habeas corpus is the exclusive means by which a state prisoner could challenge the fact or duration of his confinement in federal court. *Id.* at 482-90. As respondents concede, however, "Paraguay and its officials are not, and never have been, parties to the case that resulted in the . . . state court criminal judgment against Breard," and they are not parties to Breard's habeas proceeding. Opp'n at 3. Because a petition for habeas corpus is not now and has never been a means by which Paraguay could have asserted its own rights, Paraguay, unlike the prisoners in *Preiser*, had no opportunity to choose between habeas and another remedy such as the *Ex parte Young* and section 1983 claims it asserts here. *Preiser* is therefore inapposite. *See* Paraguay

Br. (attached to Application, dated March 31, 1998, as Exhibit 4) at 25-26 n.5; Paraguay Reply Br. (attached to Application as Exhibit 7) at 7.

Second, respondents also err when they seek support from *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990), in which this Court set forth the showing a third party wishing to challenge a prisoner's conviction or sentence needs to make in order to establish standing as the prisoner's "next friend." *See* Opp'n at 4-7. From the outset of this action, Paraguay has made clear that it is asserting its own rights and only its own rights. *See* Application at 13-15; *see also Paraguay v. Allen*, 949 F. Supp. 1269, 1274 (Vienna Convention is self-executing and Paraguay has standing to assert its own rights thereunder), *aff'd on other grounds*, *Paraguay v. Allen*, 134 F.3d. 622 (4th Cir. 1998).[1] Hence, *Whitmore*, too, is inapposite.

Third, for the same reason, respondents also err when they rely on *Gomez v. United States District Court*, 503 U.S. 653 (1992), and *Lonchar v. Thomas*, 116 S. Ct. 1293 (1996). Those cases are inapposite where, as here, the federal plaintiff has not filed the civil action in order to avoid restrictions on successive habeas

1. *See also* S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 5 (1969) (statement of Edward J. Lyerly, Deputy Legal Adviser, to Senate Foreign Relations Committee) ("[Vienna] Convention is considered entirely self-executive and does not require any implementing or complementing legislation"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 comment h (statements of executive branch in submitting treaty to Senate carry great weight in determining whether self-executing); *Blanco v. United States*, 775 F.2d 53, 60 (2d Cir. 1985) (Friendly, J.) ("The provisions of [friendship, commerce and consular rights] treaties are self-executing."); RESTATEMENT § 111 reporter's note 5 (collecting cases).

petitions. *See* Application at 13-15 (anticipating and addressing respondents' argument based on *Gomez* and *Lonchar*).

Fourth, there is no basis for respondents' assertion that granting the application here will somehow open the gates to a flood of similar actions by foreign sovereigns. Opp'n at 7-8. The reluctance of one sovereign to resort to the courts of another is well documented. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 4 at 52 (1987) ("foreign governments and officials are generally reluctant to resort to national courts of other states to vindicate rights under international law"). There is no reason to believe that a decision giving effect to federal law in the form of two treaties will alter a dynamic that has existed for centuries. In any event, if Paraguay has a right under treaties with which the United States has agreed to abide, and chooses to vindicate that right by filing suit in a court in the United States, the court should not shy away from hearing the case simply because Paraguay might succeed in demonstrating a right to the relief it seeks. And respondents' attempt to characterize the action filed by Paraguay in September 1996 as a last-minute tactic to delay Breard's execution in April 1998 is fanciful. Opp'n at 8.

Finally, there is no basis for respondents' suggestion that the Court will not grant the writ because there is no split among the Courts of Appeals. Opp'n at 8-10. As an initial matter, Paraguay demonstrated in its Petition that there *is* a split on

the requirements that an *Ex parte Young* plaintiff must meet in order to gain protection from the continuing consequences of a completed harm. Petition at 16-21. But even in the absence of such a conflict, this Court frequently grants the writ in order to address "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c) -- particularly in cases, such as this one, with significant international aspects. *See, e.g., Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989) (reversing interpretation of Foreign Sovereign Immunities Act by circuit court not advanced or contradicted by any other circuit); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 & nn.25-30 (1985) (reversing decision on international commercial arbitration that accorded with unanimous view of the five circuits to consider the question). Finally, because this action both falls within the original jurisdiction of this Court and could give rise to significant international legal ramifications, the case would warrant a grant even if the Vienna Convention and *Ex parte Young* issues did not independently warrant one -- though they do. Petition at 22-29.

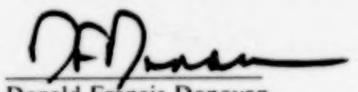
CONCLUSION

For the foregoing reasons and for the reasons set forth in the Application, Paraguay respectfully requests that this Court grant (a) a stay of execution

of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998, pending resolution of Paraguay's petition for a writ of certiorari and, if the writ is granted, further order of the Court, or (b) in the alternative, an order temporarily enjoining respondent Virginia officials from carrying out the execution subject to the same terms.

Dated: April 2, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Donald Francis Donovan, Counsel of Record for Petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, hereby certify under penalty of perjury that all parties required to be served with the petition for certiorari by the Rules of the Supreme Court of the United States have been served. On April 2, 1998, I caused a copy of the Reply in Support of Application for Stay of or Injunction Against Execution Pending Disposition of Petition for Writ of Certiorari to be served by Express Mail of the United States Postal Service upon each of the following:

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New York, New York

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A-738

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Supreme Court, U.S.
FILED
1 1998
OFFICE OF THE CLERK

THE REPUBLIC OF PARAGUAY, et al.,

Applicants

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, et al.,

Respondents

On Application for a Stay of the Execution of Angel Breard

RESPONDENTS' OPPOSITION

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QUESTION PRESENTED

May this Court stay the execution of a State prisoner, ***not*** in the context of the prisoner's ongoing collateral proceedings under 28 U.S.C. § 2254, but at the request of a third-party foreign nation and its officials who have filed a civil suit under 42 U.S.C. § 1983?

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STATEMENT OF THE CASE

On September 12, 1996, the applicants filed a civil suit under 28 U.S.C. § 1131 and 42 U.S.C. § 1983 in the same federal district court where death-row inmate Angel Breard's habeas corpus petition was pending.[1] Paraguay and its two officials asked the district court to declare that all the named defendants – from the Governor of Virginia to the Chief of Police of Arlington County – had violated, not only the Vienna Convention, but also the Friendship, Commerce and Navigation ("FCN") Treaty of 1859. According to the suit, both Breard's capital murder conviction and death sentence were unconstitutional because, at the time of his arrest, the local Virginia authorities in Arlington County failed to advise him that, pursuant to the Vienna Convention on Consular Relations ("Vienna Convention"), he had the right to contact the Paraguayan consulate.[2] From the outset of the litigation, the applicants consistently have made clear ***that the only possible remedy for the alleged violations was for the federal courts to declare Breard's capital murder conviction and death sentence void and to enjoin the respondents from taking any steps to carry out the sentence***.

On November 27, 1996, the district court determined that it did not have jurisdiction to grant the extraordinary relief requested by the applicants. Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996).[3] Paraguay appealed to the Fourth Circuit. The Court of Appeals, however, affirmed on January 22, 1998. The Fourth Circuit held that the district court was correct in ruling that Paraguay's suit against the State of Virginia was barred by the Eleventh Amendment. Republic of Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998).[4] Paraguay did not file a rehearing petition.

Paraguay filed its certiorari petition in this Court on February 24, 1998. (No. 97-1390).[5] On February 25, 1998, the state trial court scheduled Breard's execution for April 14, 1998. After waiting nearly a month, Paraguay asked the Fourth Circuit to stay Breard's execution on March 24, 1998. On March 31, 1998, the Court of Appeals denied Paraguay's request. Paraguay now has asked this Court to stay Breard's execution pending resolution of Paraguay's certiorari petition.[6]

---

[1] Contrary to the assertion in its certiorari petition, Paraguay clearly was not "[f]aced with the approaching execution" of one of its nationals at the time it filed suit. (Ptn. 17). The district court had granted Breard a stay of execution, with the Commonwealth's agreement, on April 29, 1996 – more than four months before Paraguay filed suit. (Resp. App. 1).

[2] There is no evidence that the arresting authorities advised Breard that he could contact the consulate of Paraguay, nor is there any evidence that he sought to make such contact. It is undisputed, however, that the state trial court promptly appointed two experienced attorneys to represent Breard and that those attorneys were free to contact whomever they saw fit. There also is no evidence that the arresting authorities' failure to notify Breard of his right under the Vienna Convention was the result of anything other than ignorance or inadvertence.

[3] On that same date, the district court also dismissed Breard's habeas petition, after specifically finding that his "Vienna Convention" claim was barred from federal collateral review by his failure to raise it in state court. Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996). That judgment was affirmed on appeal. See Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998).

[4] Both the Fourth Circuit and the district court ruled that there was no "continuing violation" within the meaning of Ex Parte Young, 209 U.S. 123 (1908), ***because the undisputed facts showed that Paraguayan officials had enjoyed access to Breard since at least several months prior to the filing of Breard's federal habeas petition and, indeed, had assisted Breard in the preparation of that petition***. See Paraguay, 134 F.3d at 625, 628, affirming, 949 F. Supp. at 1273.

[5] Breard filed his certiorari petition in this Court on March 11, 1998. (No. 97-8214). The Commonwealth filed its brief in opposition on March 19.

[6] On March 23, 1998, Breard asked the Fourth Circuit to stay his execution. The Court of Appeals, however, denied the request on March 27. Breard asked this Court for a stay on March 30. The Commonwealth's previously-filed brief in opposition to Breard's certiorari petition anticipated and opposed such a stay motion. Breard's stay motion, as well as his certiorari petition, remains pending.

REASONS WHY A STAY OF EXECUTION SHOULD BE DENIED

1. The applicants have no standing to obtain a stay of Breard's execution.

Whether ***Angel Breard*** is entitled to a stay of execution is an issue that this Court undoubtedly will address in the certiorari proceeding he has pending in this Court. The answer to that question, however, must depend on the merits of ***Breard's*** case, ***not Paraguay's*** civil suit. The applicants clearly have no standing to seek or obtain a stay of Breard's execution. Under this Court's Rule 23.2, "[a] party to a judgment sought to be reviewed" may seek "to stay the enforcement ***of that judgment***." (Emphasis added). See also 28 U.S.C § 2101(f) (giving this Court authority to stay "such judgment or decree" that is subject to review by petition for certiorari). Paraguay and its officials certainly were parties to the Fourth Circuit's judgment in Paraguay v. Allen, but staying that judgment cannot operate to stay Breard's execution. Paraguay and its officials are not, and never have been, parties to the case that resulted in the presumptively valid state court criminal judgment against Breard that they now seek to stay. This Court's sole authority to stay Breard's execution is pursuant to § 2251,[7] and Paraguay clearly has no standing under that statute to seek a stay because neither it nor its officials are a party to Breard's ongoing § 2254 proceeding.

At the heart of Paraguay's lawsuit is its contention that, because of alleged violations of the Vienna Convention and the 1859 FCN Treaty, the federal courts should declare Breard's capital

[7] "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may...stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251.

murder conviction "void" and enjoin Virginia from carrying out his death sentence. In Preiser v. Rodriguez, 411 U.S. 475 (1973), however, this Court held that claims challenging the validity of a state prisoner's conviction or sentence are not cognizable in a proceeding under § 1983 and that the ***sole federal remedy*** for such claims is a habeas corpus proceeding pursuant to 28 U.S.C. § 2254. See Preiser, 411 U.S. at 500; see also Heck v. Humphrey, 114 S.Ct. 2364, 2371 (1994) ("This Court has long expressed...concerns for finality and consistency and has generally declined to expand opportunities for collateral attack"); id. at 2372 (recognizing "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments").

Preiser's underlying rationale is that a contrary result would permit the circumvention of § 2254's "exhaustion" requirement, which mandates that claims challenging the validity of a state prisoner's conviction or sentence first be submitted to the state courts. See Preiser, 411 U.S. at 489-490 ("It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings"). The "exhaustion" requirement, of course, is based upon the weighty interests of federalism and comity, see id. at 491, which in turn require that federal habeas review of a state prisoner's conviction or sentence be regarded as "secondary and limited." See Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

In Breard's federal habeas case, the two lower federal courts correctly have ruled that his "Vienna Convention" claim is barred by his procedural default in failing ever to have raised the claim in state court. See Breard, 134 F.3d at 619-620, affirming, 949 F. Supp. at 1263; see

generally Gray v. Netherland, 116 S.Ct. 2074, 2080-2081 (1996) (claims never raised in state court are barred from federal habeas review).[8] It thus is obvious that the applicants are attempting to obtain a stay of execution for Breard because his underlying habeas claim is barred and, as a matter of law, cannot support the granting of a stay. This Court clearly should not permit Paraguay to obtain for Breard what he cannot obtain in his own right.[9]

In Whitmore v. Arkansas, 495 U.S. 149 (1990), this Court held that a federal court has no jurisdiction to entertain a third-party suit which asserts the invalidity of a state prisoner's conviction or sentence, unless the third party demonstrates that the prisoner, by virtue of "inaccessibility, mental incompetence or other disability," is unable to litigate such claims himself. Id. at 163-164; see also Powers v. Ohio, 499 U.S. 400, 411 (1991) ("there must exist some hindrance to the [other] party's ability to protect his or her own interests"); Warth v. Seldin, 422 U.S. 490, 499 (1975) ("this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

[8] Even if Breard's "Vienna Convention" claim were not procedurally defaulted, a federal habeas court could not grant relief upon such a claim without violating the "new rule" doctrine. See generally Caspari v. Bohlen, 510 U.S. 383, 390 (1994). No court ever has held that an alleged violation of the Vienna Convention may serve as a basis for overturning a State prisoner's conviction or sentence. If such a rule ever is created, it must be announced on direct appeal, not federal collateral review.

[9] Paraguay's present request for a stay of Breard's execution underscores the fact that, from the outset, the sole purpose of Paraguay's lawsuit has been to obtain habeas relief for Breard that he was barred from obtaining in a § 2254 proceeding. For instance, in its Fourth Circuit brief, Paraguay admitted that "the state court [criminal] judgment [against Breard] is the event which gives rise to [Paraguay's] claim." (Resp. App. 2-3). And, in the district court, Paraguay expressly stated that "vacatur of Breard's conviction and sentence is...the only way Paraguay can vindicate its own rights under the Treaties." (Resp. App. 4-5). Moreover, when specifically questioned by the district court, Paraguay stated unequivocally that vacating Breard's conviction and sentence was "the ***only*** appropriate relief." (Resp. App. 6-7, emphasis added).

Here, the applicants have not even alleged that Breard is unable to litigate the validity of his capital murder conviction and death sentence or to seek a stay of execution on his own behalf. To the contrary, Breard's pending federal habeas proceeding in this Court, where he is represented by a host of other attorneys and has raised substantially the same treaty claim that the applicants have raised, is irrefutable proof that Breard is able to litigate these issues himself. The fact that Breard's "Vienna Convention" claim is procedurally defaulted, and therefore has no chance of success, does nothing to confer standing upon the applicants.

2. A non-habeas civil suit may not be used to obtain a stay of execution that could not be obtained under the rules governing § 2254 proceedings.

In Gomez v. United States District Court, 503 U.S. 653 (1992), this Court made clear that a § 1983 suit cannot be employed to obtain a stay of execution that would be precluded under the rules governing successive federal habeas petitions. See Lonchar v. Thomas, 116 S.Ct. 1293, 1301 (1996) (interpreting Gomez to mean that the habeas rules "would apply, even if § 1983 [was] also a proper vehicle [for the] claim"); Felker v. Turpin, 101 F.3d 95, 96 (11th Cir.) ("Gomez held that a plaintiff cannot escape the rules regarding second or successive habeas petitions by simply filing a § 1983 claim"), cert. denied, 117 S.Ct. 451 (1996). Regardless of whether such a § 1983 suit is filed by the prisoner himself or by a third party, ***if the object of the suit is to obtain for the prisoner relief from his conviction or sentence to which he would not be entitled in a federal habeas proceeding, Gomez dictates that the attempted circumvention must fail***.

On numerous occasions during just the last year, this Court has denied stays of execution premised upon ongoing § 1983 litigation designed to evade the rules governing federal habeas

review under § 2254. See, e.g., Buchanan v. Gilmore, 118 S.Ct. ____, 1998 U.S. LEXIS 1782 (Mar. 18, 1998); Tucker v. Texas, 118 S.Ct. 906 (1998); In re Mu'Min, 118 S.Ct. 438 (1997) (in addition to denying stay, Court also denied "petition for writ to preserve [§ 1983] jurisdiction"); Perry v. Norris, 118 S.Ct. 15 (1997); O'Dell v. Allen, 118 S.Ct. 2 (1997) (denial of injunction); In re O'Dell, 118 S.Ct. 2 (1997) (denial of stay); McQueen v. Sapp, 117 S.Ct. 2536 (1997); Woratzeck v. Arizona Board of Clemency, 117 S.Ct. 2500 (1997). See also Griffin v. Missouri, 515 U.S. 1153 (1995); Poyner v. Murray, 507 U.S. 981 (1993).[10]

Even if Paraguay could speak for Breard - and it cannot - it clearly would not be entitled to a stay of Breard's execution under the stringent rules governing federal habeas proceedings. Gomez and its progeny require that this Court deny Paraguay's attempt to circumvent those rules by requesting a stay of Breard's execution, an extraordinary form of federal collateral relief to which neither Breard nor Paraguay is entitled.

3. Granting a stay of execution in this case would encourage a flood of third party civil suits designed to obtain relief for state death row prisoners.

It would be difficult to exaggerate the ruinous effect if this Court were to stay the execution of a State prisoner – who is not entitled to a stay in his own right – at the behest of a third party who has filed a civil suit which, by its own terms, would become moot or at least "prejudiced" if the prisoner is executed. As this Court is aware, death row inmates and their attorneys have fertile imaginations. But it takes no imagination at all to see that an unlimited number of contrived civil

[10] In Poyner, this Court denied a stay of execution and the prisoner was executed as scheduled on March 18, 1993. Significantly, this Court did not dispose of the certiorari petition in the § 1983 proceeding upon which the stay request had been premised until two months later. See Poyner v. Murray, 508 U.S. 931 (1993).

suits would be filed by those attempting to obtain relief for capital murderers who already have been denied relief in their own cases. Challenges under § 1983 to a State's method of execution, its executive clemency mechanism, or its compliance with a treaty are merely the most current examples; there undoubtedly would be others.

When a capital case has survived direct appeal and a full round of state and federal collateral proceedings, the "name of the game" from the perspective of the prisoner and his supporters is delay by any means possible. This Court's recent capital jurisprudence, however, as well as Congress' recent habeas reform, has been directed to ensuring that, once the case has reached this late stage, the opportunities for additional delay are eliminated or at least greatly minimized. Granting Paraguay's request for a stay of Breard's execution would represent a major step backward and, indeed, would foster the type of delay that engenders disrespect for our criminal justice system. See generally McCleskey v. Zant, 499 U.S. 467, 492 (1991) ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system").

4. There is no reasonable probability that certiorari will be granted in this case because there is no conflict among the courts of appeal regarding whether a foreign country may sue a State in federal court in order to invalidate a state prisoner's criminal conviction or sentence.

Even if Paraguay could overcome all of the foregoing obstacles to the granting of a stay, this Court still should deny Paraguay's request to stay Breard's execution. Under Barefoot, 463 U.S. at 880, this Court may not stay a State prisoner's execution unless there is a reasonable probability that four Justices would vote to grant certiorari ***in his case***, and there is a significant possibility the Court would reverse the decision of the court of appeals. See Netherland v. Tuggle, 116 S.Ct. 4, 5 (1995). Paraguay cannot possibly meet this stringent standard.

As previously demonstrated, both here and in the brief in opposition the Commonwealth has filed in Breard's case, there is ***no*** likelihood this Court will grant Breard's certiorari petition or reverse the Fourth Circuit's decision denying him federal habeas relief. But, even if the granting of a stay of Breard's execution could be made to turn on the likelihood the Court will grant ***Paraguay's*** certiorari petition, the result would be the same. The specific issue raised in Paraguay's certiorari petition is whether the federal courts have jurisdiction to entertain a civil suit brought by a foreign country and its officials against the officials of a State, ***where the sole object of the suit is the invalidation of a state prisoner's criminal conviction and sentence***.[11] On that issue, the only two federal appeals courts that have considered the matter have concurred that the question must be answered in the negative. See Paraguay, 134 F.3d at 627-629; United Mexican States v. Woods, 126 F.3d 1220, 1222-1224 (9th Cir. 1997).[12]

This Court, of course, grants certiorari "only for compelling reasons." U.S.Sup.Ct. Rule 10. Primary among such "compelling reasons" is the existence of a "conflict" between the decision of a court of appeals in the case where review is being sought and "the decision of another...court of appeals on the same important matter." Rule 10(a). Indeed, "[t]he occurrence of a conflict acts as a signaling device to help the Court identify important issues." Estreicher and Sexton, A Managerial

[11] Thus, any argument that denying certiorari would leave foreign countries with "no remedy" for an alleged treaty violation is an obvious overstatement. This case says nothing about federal jurisdiction generally, but only that there is no federal jurisdiction to entertain a lawsuit filed by a foreign nation against a State where the requested relief is the invalidation of a State prisoner's criminal conviction and/or sentence.

[12] Mexico filed its certiorari petition in the Woods case from Arizona on February 20, 1997. (No. 97-1365). While this Court has granted certiorari in the Arizona prisoner's federal habeas case, review was granted ***upon the State's petition*** and the issue there has absolutely nothing to do with an alleged treaty violation. See Stewart v. Martinez-Villareal, 118 S.Ct. 294 (1997) (granting review to determine whether "competency to be executed" claim may be raised in a successive federal habeas petition).

Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U.L. Rev. 677, 719 (1984).

Here, the total absence of conflict among the courts of appeals, as well as the fact that only two circuits even have had occasion to consider the issue, should signal to the Court that it would be premature to grant review on the issue at hand. "'The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts.'" California v. Carney, 471 U.S. 386, 400 n. 11 (1985) (Stevens, J., dissenting), quoting Estreicher & Sexton, 59 N.Y.U.L. Rev. at 719.

Given the lack of conflict among the courts of appeals, there is no reasonable probability that this Court will grant certiorari in Paraguay's case. Paraguay's pending certiorari petition, therefore, could not furnish the basis for a stay of Breard's execution even if Paraguay could overcome its clear lack of standing to request such relief.

5. There is no significant possibility that this Court would reverse the Fourth Circuit's decision.

The Fourth Circuit's decision undeniably is correct. The Eleventh Amendment clearly does not permit a foreign nation to sue a State in federal court. See Principality of Monaco v. Mississippi, 292 U.S. 318 (1934). A suit, the primary purpose of which is the setting aside of a State prisoner's criminal conviction or sentence is, in reality, a suit against the State, see Idaho v. Coeur d'Alene Tribe, 117 S.Ct. 2028, 2034 (1997) (Eleventh Amendment bars suit against state officials when State is the real, substantial party in interest), and the State's interests are at their apex when the validity of its criminal judgments are challenged collaterally in federal court. See generally McCleskey, 499 U.S. at 491-492. Moreover, the statutory habeas corpus remedy

embodied in § 2254 proceedings is "well-established" as the sole relevant exception to the State's Eleventh Amendment immunity. See Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1182 (1996) (Souter, J., dissenting); Paraguay, 134 F.3d at 627-628 n.6. Therefore, outside the limited context of federal collateral proceedings initiated by a State prisoner, the federal courts have no jurisdiction to entertain a suit, like Paraguay's, where the *sine qua non* is the overturning of the prisoner's capital murder conviction and death sentence. See Paraguay, 134 F.3d at 627-629; Woods, 126 F.3d at 1222-1224.

Even if the Fourth Circuit were wrong about the Eleventh Amendment, there ***still*** would be no significant possibility of reversal in this case. As the district court found, see Paraguay, 949 F. Supp. at 1273, the lower federal courts have no jurisdiction to conduct what is, in effect, a direct review of the State court criminal judgment against Breard. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923).

Moreover, as both the Commonwealth ***and the United States*** argued in the Fourth Circuit,[13] the issues raised by Paraguay about alleged treaty violations and the remedies therefor, are essentially non-justiciable "political questions" which are beyond the jurisdiction of the federal courts. See generally Baker v. Carr, 369 U.S. 186, 211 (1962); see also Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject

[13] The United States filed an amicus brief in the Fourth Circuit supporting the Commonwealth's position that the federal courts lack jurisdiction to entertain Paraguay's suit. The United States also presented its position during oral argument in the Court of Appeals on June 4, 1997. Finally, the United States communicated its position to Paraguay in a letter from the Department of State to the Ambassador of Paraguay dated July 7, 1997. (Resp. App. 8-10).

of international negotiations and reclamations...[but] with all this the judicial courts have nothing to do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department").

Because there is no significant possibility that this Court would reverse the Fourth Circuit's conclusion that the federal courts lack jurisdiction to entertain Paraguay's suit, the pending certiorari petition cannot possibly serve as the basis for a stay of execution.[14]

CONCLUSION

Paraguay's motion for a stay of Angel Breard's execution should be denied.

Respectfully submitted,

JAMES S. GILMORE, III, GOVERNOR
OF VIRGINIA, et al.

By: _____
Donald R. Curry
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[14] Under Barefoot, in addition to the "substantial probability" and "significant possibility" requirements, the party seeking a stay of execution also must demonstrate a "likelihood of irreparable harm." See Barefoot, 463 U.S. at 895. When the movant is a death row prisoner himself, this requirement usually is deemed satisfied. Paraguay, however, simply cannot demonstrate any likelihood of "irreparable harm" to itself or to its officials if Breard is executed while its certiorari petition remains pending, ***especially if Breard himself has asked for and been denied a stay***.

CERTIFICATE OF SERVICE

On April 1, 1998, a copy of the foregoing Opposition was mailed and faxed to Donald F. Donovan, Debevoise & Plimpton, 875 Third Avenue, New York, NY 10022, counsel for applicants.

Donald R. Curry
Senior Assistant Attorney General

RESPONDENTS' APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FILED
APR 29 1996
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

ANGEL FRANCISCO BREARD,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,

Respondent.

Civil Action No. 3:96cv366

ORDER

This matter is before the Court on the petitioner's motions to proceed in forma pauperis and for stay of execution. Upon due consideration and for good cause shown, it is hereby

ORDERED that the motion to proceed in forma pauperis is GRANTED; and it is further

ORDERED that the motion for a stay of execution is GRANTED.

It is so ORDERED.

Let the Clerk send a copy of this Order to counsel for the Respondent and to Donald R. Lee, Virginia Capital Representation Resource Center, PO Box 506, Richmond, VA 23204-0506.

APR 29 1996
DATE

Richard L. Williams
UNITED STATES DISTRICT COURT JUDGE

RECEIVED
APR 26 1995
CLERK, U.S. DISTRICT COURT
RICHMOND, VA

2

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and JOSÉ ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs-Appellants,

— against —

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia, *(additional parties listed inside cover)*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PLAINTIFFS-APPELLANTS' BRIEF

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Dated: March 4, 1997

Under no rationale can the state court judgment preclude Paraguay's claim here. The essence of Paraguay's claim is that it was deprived of its federally protected right to assist its citizen because it was never informed of the existence of the proceedings against him. By suggesting that the very proceeding from which Paraguay was unlawfully excluded could preclude Paraguay from asserting its right to assist in such proceedings, the District Court engaged in circular reasoning that finds no support in the authority on which it relied. The state court judgment is the event which gives rise to Paraguay's claim. It cannot at the same time pose a bar to that claim.

5.(...continued)
situation like this where it so clearly applies." 411 U.S. at 489.

Here, on its own terms, *Preiser* does not apply. The defendants never contended that Paraguay had a remedy under the federal habeas statute. Unlike the Court in *Preiser*, the District Court here was not called upon to decide between a general statute and a specific statute, either of which could provide complete relief on the facts pleaded. *See Preiser*, 411 U.S. at 488.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

THE REPUBLIC OF PARAGUAY, et al.,	)	
	)	
Plaintiffs.	)	Civil Action No.
	)	
-against-	)	3:96CV745
	)	
GEORGE F. ALLEN, et al.,	)	
	)	
Defendants.	)	
	)	

OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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October 29, 1996

Paraguay is therefore not using this action as an impermissible appeal from an adverse state-court judgment. *Feldman* is inapposite.

Finally, *Whitmore* held that a third party cannot establish standing, as another person's "next friend," to challenge the validity of that person's conviction and sentence by either appeal or habeas unless, first, the "'next friend' . . . provide[s] an adequate explanation -- such as inaccessibility, mental incompetence, or other disability -- why the real party in interest cannot appear on his own behalf to prosecute the action" and, second, the "next friend" establishes that he is "truly dedicated to the best interests of the person on whose behalf he seeks to litigate." 495 U.S. at 163-64. Here, however, Paraguay does not seek to litigate on Breard's behalf: vacatur of Breard's conviction and sentence is instead the only way Paraguay can vindicate *its own rights* under the Treaties, and it is the real party in interest. *Whitmore*, too, is inapposite.

C. The Court Should Declare Paraguay's Rights Under The Treaties.

Defendants argue that the Court should exercise its discretion to refrain from entering a declaratory judgment with respect to the violation of Paraguay's rights under the Treaties. Def. Br. 23-24 (Part VIII); *see* Complaint ¶¶ A-E. Defendants' contention is without merit.

First, defendants' declaratory judgment argument is based on their erroneous contentions that *Preiser*, *Feldman*, and *Whitmore* require Paraguay's claims

the case law that fail --

THE COURT: Did you prosecute the case at the trial level?

MR. TRAMBLIAN: No, Your Honor. The Commonwealth's Attorney would do that. Our office, County Attorney's Office, would not be involved. But, if the failure of a police officer to Mirandize a suspect can't give rise to liability, I don't see how this is different. For all these reasons and for the reasons mentioned by Mr. Curry and our petition, we ask the motion be granted. Thank you.

THE COURT: Mr. Donovan.

MR. DONOVAN: Good morning, Your Honor. Your Honor, I would like to address the two principle arguments that it appears that the defendants are making. The first is that somehow this is an attempt to end-run the habeas proceeding, and secondly that somehow Paraguay is speaking artificially or hypertechnically when it describes what's happening here as an ongoing violation.

THE COURT: What relief could I give Paraguay that would be meaningful to it other than setting the conviction aside and awarding a new trial?

MR. DONOVAN: Well, we believe, Your

Honor, that that is, in fact, what the Court should order. The Court should order the vacatur of the conviction and sentence on the grounds that it was achieved only in violation of Paraguay's rights under the Vienna Convention and Friendship Treaty and that's the relief that we've requested in the complaint and we believe that's the only appropriate relief. We also asked for declaration for those rights. But we asked for a declaration that this conviction is void and injunction that's going forward that this defendant respect Paraguay's right with respect to the treaties.

THE COURT: Why is that the functional equivalency of habeas corpus which is personal to the individual who seeks his freedom?

MR. DONOVAN: It's not the functional equivalent because the basis of this suit -- and if I could step back a moment I will describe the basis on which Paraguay asserts its rights. But to answer the Court's question directly, the basis of this suit is Paraguay's rights under the Vienna Convention and Friendship Treaty. We are not here asserting a -- trying to end-run a habeas corpus proceeding as in Papasan(phonetic) case on which the defendants rely because Paraguay is not in custody and Paraguay

United States Department of State

Washington, D.C. 20520

JUL - 7 1997

Dear Ambassador Prieto:

I am responding on behalf of the Department of State to your letter to Ambassador Davidow of June 3, 1997, concerning the matter of Mr. Angel Breard. Your letter was received at the same time that my letter to you of the same date concerning this case was delivered to your representatives. Your letter reiterates your government's earlier request that the United States intercede on behalf of Mr. Breard. It also again expresses the view that the courts of the United States have authority to remedy any violation of the obligation of consular notification that occurred with respect to his detention and discusses the alternative possibility of these matters being considered by the International Court of Justice.

We have previously assured your government that the United States places the highest value on ensuring respect for the consular notification obligation under Article 36 of the Vienna Convention on Consular Relations ("VCCR"). We deeply regret if such notification was not provided to Mr. Breard. After learning that Mr. Breard may not have been advised of his right to consular assistance, the Department reminded officials of the State of Virginia of the need to advise all alien detainees of this right. We have now had extensive discussions with such officials about how consular notification and access should be implemented.

Since receiving your June 3 letter, the Department has also reviewed in more detail the facts of Mr. Breard's case, with a particular focus on the consular notification issues raised by your government and the claim that a consular officer could have dissuaded Mr. Breard from believing that that he should confess in open court to the February 17, 1992, murder of Ruth Dickie and claim to have been under a "Satanic curse" imposed by his father-in-law. Attached for your information is a summary of the facts as we understand them. (If there is additional information that you believe we have not considered, we would be pleased to receive it.)

Our review has been informed by our understanding of the consular notification obligation. A primary purpose of consular notification is to permit a state to offer its nationals in a foreign country the benefit of consular services and protection. The actual extent of consular assistance will depend on the country concerned, its consular practices, and its resources in the host country. Under no circumstances, however, can a consular officer in the United States act as an attorney for an alien. Moreover, when an alien is arrested, he is subject to the laws of the host state, and consular protection cannot immunize him from those laws, the judicial system established to enforce them, or the penalties imposed for their violation. A consular officer instead generally seeks to ensure that the alien has appropriate legal representation and that his legal rights are respected. The consular officer may also attend to the alien's needs while imprisoned, and may communicate with the alien's family and friends, if necessary. The actual need for and provision of consular services will generally be less in

The Honorable
Jorge G. Prieto,
Ambassador of Paraguay,
Washington.

situations where an alien is well represented by attorneys and in direct touch with family and friends – a situation most likely when the alien has been residing in the host country for a significant period. In some cases, an alien may decline consular notification, for privacy or other reasons, or because the alien does not consider consular assistance to be necessary.

While the obligation of consular notification is a serious one, in every country there are times when it is overlooked. U.S. diplomatic and consular officers raise issues of lack of consular notification with respect to U.S. nationals abroad, just as other countries' representatives raise similar concerns with the Department of State about aliens in the United States. Consular notification and access is a matter of continuous discussion between governments, which in our experience regularly review and if necessary enhance their efforts at compliance. Neither the VCCR text nor its negotiating record addresses how a failure to comply with the consular notification obligation must be remedied. We are aware of no state party to the VCCR that has a procedure for setting aside the results of its judicial process when there has been a failure to provide consular notification.

Having reviewed the facts in light of these considerations, we cannot accept that the lack of consular notification provides a basis for undoing Mr. Breard's conviction and sentence. It is entirely speculative, in any event, that a Paraguayan consul would have been intimately involved in Mr. Breard's trial and defense and would have convinced Mr. Breard to accept a plea bargain. Mr. Breard's attorneys were well positioned to advise him of the likely consequences of his confession in the State of Virginia, yet he would not accept their advice or the apparent advice of his mother to plead guilty. It is difficult to believe that a consular officer could have proven more persuasive.

Our review of these issues has reinforced our view that lawsuits between governments are not the appropriate means to enforce the consular notification obligation. We agree in particular with your assessment that this case is not one appropriate for resolution by the International Court of Justice. The reference to the VCCR Optional Protocol in our amicus brief was simply to illustrate that the state parties to the VCCR contemplated that issues under the VCCR would be addressed on a government-to-government basis, and certainly not by a government resorting to the domestic courts of another state party. We regret if that reference created any misunderstanding on this point. In any event, however, an ICJ proceeding is both costly and takes many years and extensive resources to pursue. It seems particularly inappropriate when there is no genuine dispute as to the requirements of consular notification and when the suggestion that consular notification in a particular case would have led to a different result is so speculative and implausible. Moreover, the ICJ would not have jurisdiction over Paraguay's asserted claims under the 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, which is not relevant to these issues in any event.

In closing, I reiterate that the Department of State remains available to consider other relevant information, including information about Mr. Breard's case and about consular notification practice by Paraguay and other countries. In addition, we would welcome the opportunity to discuss with Paraguayan consular officers the general question of consular notification and access and how our respective countries can improve implementation of this obligation.

Sincerely,

James Thessin

James H. Thessin
Deputy Legal Adviser

FACTS CONCERNING ANGEL BREARD

Mr. Breard is a dual Paraguayan-Argentinian national who came to the United States in 1986, originally as a student. He had been in the United States for roughly six years at the time he was arrested for Ruth Dickie's murder. He studied English when he first arrived here, and his command of English was sufficiently good that he acted as an interpreter in prison and did not require the assistance of an interpreter at trial. His trial attorneys have stated that they had no difficulty in communicating with him.

The State of Virginia cannot document that consular notification was given, but it is clear that Mr. Breard's family was quickly notified of his arrest and that others in Paraguay were also contacted. When he was first arrested, Mr. Breard asserted his right to an attorney and called his uncle. His mother testified on his behalf in the sentencing phase. In addition, Mr. Breard's attorneys have said that they were in touch with sources in Paraguay for information that might have assisted with his defense.

Mr. Breard's attorneys have also stated that they and his mother advised him to plead guilty. They have further stated that they advised Mr. Breard that his chances of being sentenced to death, rather than to life imprisonment, would be greater if he insisted on a trial and testified. As far as the courts have determined to date, Mr. Breard's attorneys were competent and he had the full panoply of due process protections guaranteed by the Constitution of the United States. These protections are among the most extensive provided by any state party to the VCCR.

Mr. Breard rejected the advice of his attorneys, refused to pursue a possible plea arrangement, and insisted on testifying at trial and at his sentencing hearing. The court was informed that Mr. Breard was testifying against the advice of counsel. He testified to the facts of the crime and claimed to have acted under a "Satanic curse" imposed by his father-in-law. During the sentencing phase, his testimony led to cross-examination that his trial attorneys have said had a negative effect on the jury.

Independently of Mr. Breard's testimony there was physical evidence that Mr. Breard attempted to rape and then brutally murdered Ruth Dickie on February 17, 1992. Blood, semen, and hair samples and DNA tests all pointed to Mr. Breard as the murderer. There was also evidence of significant aggravating factors to support imposition of the death penalty under Virginia law. The scene of the crime reflected the violence of Ruth Dickie's murder and the attempted rape that preceded it. Mr. Breard had attacked two other women, one before and one after Ruth Dickie's murder. Each attack was violent, and the second involved a sexual assault that was interrupted only because a neighbor called the police, who caught Mr. Breard with his victim. The arrest of Mr. Breard in the course of this assault led to Mr. Breard being charged with Ruth Dickie's murder.

It appears from these facts that Mr. Breard received the assistance that consular notification is designed to ensure. He had two attorneys and was in close touch with his family and others who might have helped him. Mr. Breard was a six-year U.S. resident who asked for an attorney when arrested; he apparently understood at least this basic tenet of the U.S. system reasonably well. In any event, however, he was clearly and repeatedly informed that it would not be to his benefit to plead not guilty and then to confess at trial.

BEST AVAILABLE COPY

No. 97-1390

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARIA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners,

- v. -

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, *et al.*,
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER BY THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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Dated: April 13, 1998

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MOTIONS

The Association of the Bar of the City of New York (the "Association") hereby moves for permission to file this brief as *amicus curiae* in these proceedings.[1] Time is of the essence because the execution of Angel Francisco Breard, which will make this matter moot, is scheduled for tomorrow, April 14, 1998. The Association has been unable to obtain consent from the parties to this proceeding prior to the filing of this brief.

PRELIMINARY STATEMENT

The Association respectfully submits this brief to urge this Court to issue a stay of the execution of Angel Francisco Breard, a national of Paraguay, pending a decision on the merits of the Application of the Republic of Paraguay against the United States filed with the International Court of Justice (the "International Court") on 3 April 1998 (the "Application") as indicated by the International Court in its order entered on 9 April 1998 (the "Order").

The Association believes that the respect for international law which is shared by the world community, as well as the interests of the United States and its citizens, mandates such a stay. In the Order the International Court *unanimously* held that "the United States should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order . . . . " Order, para.41. The Order is provisional in nature and without prejudice to any decision on the merits by the International Court or by this Court.

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[1] Pursuant to Rule 37(6) of this Court, no counsel for a party to this action authored this brief in whole or in part and no other persons or entities other than the amicus curiae and its counsel made a monetary contribution to the preparation and submission of this brief.

For this Court to ignore the Order of the International Court would gravely prejudice a decision on the merits by the International Court and would evidence disrespect for the rules of law governing all nations. The Association is particularly concerned that failure to defer to the Order would seriously threaten the interests of the United States and its citizens in foreign countries where the rights of Americans depend upon the compliance by foreign nations with the rule of law, including treaties and orders of the International Court.

It is the position of the Association that the interest of the United States in promoting the rule of law and in promoting compliance with Orders of the International Court far outweighs the interest of the Commonwealth of Virginia in not postponing the carrying out of its death sentence.

INTERESTS OF THE AMICUS CURIAE

The Association of the Bar of the City of New York is comprised of 21,000 lawyers admitted to practice in nearly every State and in over 50 nations. Through having followed and analyzed the development of international law and United States constitutional law, the Association has developed significant expertise and understanding in these matters. The Association has been particularly concerned with supporting and defending the rule of law, including international law and the recognition and enforcement of internationally recognized human rights norms in foreign countries.[2] The effectiveness of the Association's efforts in

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[2] The Association has published numerous reports on a variety of human rights issues, including "Report on Hong Kong Mission" (May 23, 1996); "Uganda at the Crossroads -- A Report on Current Human Rights Conditions" (June 17, 1991); "The Inter-American Commission on Human Rights: A Promise Unfulfilled" (December 30, 1992); "Human Rights and the Administration of Justice in Chile" (Mar. 20, 1987); "Torture in Turkey: The Legal

these areas has depended to a significant degree on the respect for the rule of international law by the United States and its courts and political subdivisions.

ARGUMENT

The issues in the proceeding which is now pending before the International Court arise from violations by the Commonwealth of Virginia of the Vienna Convention on Consular Relations, Apr. 24, 1963, TIAS 6820, 21 U.S.T. 77 (the "Vienna Convention"), in failing to notify Angel Francisco Breard of his right to contact the Paraguay consul when he was arrested for a capital offense. At issue is whether Paraguay is entitled to restoration of Breard's situation before the treaty violation occurred. The Order of the International Court was issued simply "to preserve the respective rights of Paraguay and the United States" pending a decision on the merits which should be "reached with all possible expedition." Order, para. 40.

The United States and Paraguay are parties to the Vienna Convention. In subscribing to the United Nations Charter, the United States became a party to the Statute of the International Court of Justice. U.N. Charter, Art. 93. The International Court has the power

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System's Response" (Nov. 1, 1989); "Update on the 1990 Report on the Response by the Turkish Legal System of the Problem of Torture in Turkey" (May 1, 1996); "The Decline of the Rule of Law in Singapore and Malaysia" (July 22, 1993); "The Kosovo Crisis and Human Rights in Yugoslavia" (Jan., 28, 1991); "The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Aug. 26, 1986); "Criminal Justice and Human Rights in Northern Ireland" (Nov. 12, 1987); "Human Rights and the Administration of Justice in Guatemala" (July 2, 1993); "Torture Victim Protection Act" (Oct. 13, 1987); "Human Rights in Cuba" (July 13, 1988); "Human Rights Advocacy in the Philippines: A Report by a Member of a Mission of Inquiry" (Aug,. 11, 1994); "Development of the Legal Profession in Central Asia: A Report from Kyrgyzstan" (Dec. 14, 1994); and "Report on the Mission to Peru, May 1994" (June 10, 1996).

"to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Statute of the International Court of Justice, Oct. 24, 1945, Art. 41. Pursuant to Article 94(1) of the United Nations Charter, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." Following the filing on 3 April 1998 of the Application of Paraguay, the United States appointed an agent of the government of the United States for this case and appeared at hearings before the International Court on 7 April 1998 in accordance with the rules of the International Court. Order, paras. 11, 13, 16.

The grave question before this Court now is whether the government of the United States and the Commonwealth of Virginia should be permitted, pending a decision by the International Court on the merits, to avoid their obligations under international law. Under the Constitution, treaty obligations are part of "the supreme law of the Land." U.S. Const., Art. VI, cl. 2. Since the judicial power of the United States extends to all cases arising under, inter alia, treaties, U.S. Const., Art. III, Sec. 1, that question becomes whether this Court, by refusing to grant a stay, should enable such avoidance. We submit that this Court should enforce the obligations of the parties under international law.

Indeed, as a matter of U.S. law and as a practical matter in this case, the only governmental body that can enforce the treaty obligations of the United States is this Court.[3]

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[3] The United States argued before the International Court that a stay of execution depends exclusively on the United States Supreme Court and the Governor of Virginia. Order, para. 19. The Governor of Virginia has recently stated that he "is not looking toward the State Department or the International Court for guidance on Tuesday's execution -- only the U.S.Supreme Court." Richmond Times Dispatch, April 11, 1997, "Inmate's Lawyer Files

The Executive Branch seems to have exhausted its resources by sending a copy of the International Court's order to the Governor of the Commonwealth with a "request that you give full consideration" to it -- a request that the Governor has already said he will ignore. Id.

The failure of this Court to take measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision of the International Court, as expressly indicated by that Court, would evidence a profound disrespect for the development of international law and for the International Court and establish a gruesome precedent.

Besides running against the long established efforts of this country to establish the rule of law on this planet and complicating our foreign relations, such a precedent would leave the United States and its citizens at the mercy of similar action by any foreign government. Indeed, the United States itself has in the recent past sought and obtained a provisional indication from the International Court under the Vienna Convention when concerned that the lives of its citizens might be in peril. United States Diplomatic and Consular Staff in Teheran (United States v. Iran) Judgment 24 May 1980, I.C.J. Reports 1980. Surely, the interests of the United States in promoting respect for international law in foreign countries, as well as in the United States, and in protecting itself and its citizens from unlawful actions by foreign authorities dramatically outweighs the interest of the Commonwealth of Virginia in expediting Breard's death sentence at this time.

Appeal; Treaty Rights Hearing is Sought in U.S."

CONCLUSION

For the reasons stated above, the Association respectfully requests that this Court grant a stay of the execution of Angel Francisco Breard which has been scheduled for April 14, 1998, pending a decision of the International Court on the Application of Paraguay.

Dated: April 13, 1998

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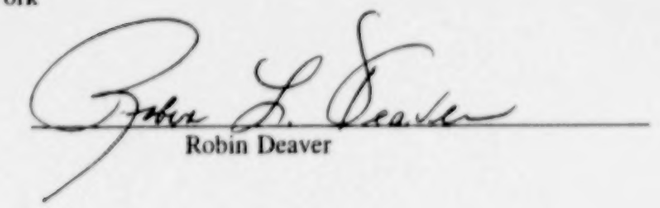

Robin Deaver

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REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Dated: April 14, 1998

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IN THE

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REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

As the Solicitor General's brief makes clear, this case is precisely the kind of case that this Court was created to decide. The International Court of Justice has ruled 15-0 that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision" in the proceedings instituted by Paraguay against the United States in that Court. The United States advises the Court that the Secretary of State has told the Governor of the

Commonwealth of Virginia that, in light of the ICJ Order, the "unique and difficult foreign policy issues" raised by the case, and "other problems created by the Court's provisional measures," the execution should be stayed. U.S. Br. at 46 & App. F.

According to the Solicitor General, "'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion." U.S. Br. at 51 (quoting ICJ Order; brackets in U.S. Br.). Hence, the Solicitor General advises that the Executive Branch is content to do no more than send the Secretary's letter, and then sit idly by while the Governor – who, the United States advises, turned down an earlier, similar request by the Secretary that could have avoided Paraguay's filing in the ICJ, U.S. Br. at 11 – determines whether he should adhere to the Secretary's new request. The Solicitor General invites the Court similarly to sit on the sidelines by denying Paraguay's requests for relief. Hence, according to the Solicitor General, the Governor of Virginia is now to determine whether the United States will comply with the ICJ Order.

In the face of the conflict in the Executive Branch, and the profound constitutional disorientation that would result if the question of compliance with an ICJ Order were left to the Governor of Virginia, this Court should grant the petition, the motion for leave to file the original complaint, and the accompanying motions for provisional relief, so that it may then decide, with both adequate time and adequate briefing, whether the United States will comply with or disregard the ICJ Order and the United States's obligations under the treaties involved in this case.

This Court plainly has the authority to decide these matters. *First*, the law of foreign relations and international obligations is quintessentially federal. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for foreign relations purposes, federal foreign relations authority is plenary).[1] *Second*, it is emphatically this Court's job to say what federal law is and to enforce that law against noncomplying state officials. *E.g., Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *see also Jones v. Meehan*, 175 U.S. 1, 32 (1899) (interpretation of treaties "the peculiar province of the judiciary"). *Third*, the Framers gave this Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls" and federal courts jurisdiction in "Cases . . . arising under . . . Treaties," U.S. Const., art. III, § 2, specifically in order to prevent disputes such as this one from creating an

1. The breadth of federal authority in the area of international relations belies the suggestion by the United States that it is constitutionally incapable of enforcing compliance by state officials with federal law in the form of the United States's international obligations -- a proposition also flatly contradicted by the very brief in which the statement is made. U.S. Br. at 15 n.3 (citing *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982), to establish "the ability of the United States to sue in order to enforce compliance with the Vienna Convention"); *see United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), *aff'd on opinion below*, 450 F.2d 884 (2d Cir. 1971) (suit by United States to enjoin municipality from assessing taxes on property owned by foreign government); *see also Dames & Moore v. Regan*, 453 U.S. 654 (1981) (affording Executive Branch great latitude in effecting resolution of international dispute); *Asakura v. Seattle*, 265 U.S. 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (enjoining enforcement of state judgment entered in violation of federal law).

international incident. Petition, No. 97-1390, at 25-29. *Finally*, as a matter of international law, the judiciary engages the United States' international responsibility as fully as does the executive. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility).

Particularly in light of the confusion in the Executive Branch, this Court should exercise its authority to decide both the original case filed by Paraguay and the case here on petition for certiorari. *First*, the Secretary of State's letter makes plain the weighty federal interest threatened by Virginia's noncompliance:

> I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the [Vienna] Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or traveling abroad.

The Secretary's letter echoes the views expressed by Judge Stephen M. Schwebel of the United States, the President of the ICJ, when he wrote in his declaration explaining his vote in favor of the ICJ Order that

> The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the

> greater in the ~~intermixed~~ global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States).

In light of these observations, there can be no question of both the national and international importance of the case.

Second, there should be no question that the determination of the United States' compliance or refusal to comply with the ICJ Order should be decided by a federal authority. The United States "sp[oke] with one voice," *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979), when it undertook the obligations contained in the United Nations Charter, the Statute of the International Court of Justice, the Vienna Convention on Consular Relations, and its Optional Protocol. Equally, it should be an organ of the whole people, not of an individual state, that determines whether the United States will comply. *See United States v. Pink*, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement"); *United States v. Belmont*, 301 U.S. 304, 324, 331 (1937) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states").

Third, the Court's opportunity to make that determination with the attention it deserves should not be sacrificed to the rush to meet an arbitrary execution date set by Virginia some months ago. Paraguay recognizes the right of the

Commonwealth of Virginia and other competent authorities of the United States to prosecute and punish crimes within its jurisdiction, including its right to retry Mr. Breard if Paraguay prevails on its claims. Thus, the only interest at stake for Virginia if Paraguay's claims are denied is a delayed execution. By contrast, Paraguay faces the undoubted irreparable harm that an execution would cause, and the United States faces the harm to its status as a supporter of the rule of law in the world community that would result from a decision not even to consider with due deliberation the implications of Paraguay's claims and the possible consequences of disregarding of the ICJ Order.

Finally, separate and apart from the United States' interest generally in upholding the rule of law, the Court should consider the harm that would flow from a peremptory disregard *by this Court* of the ICJ Order. This Court, more than even the Secretary of State or other executive officials, will appreciate the harm to the rule of law, and to respect for judicial authority as the ultimate safeguard of the rule of law, of a decision by the United States, after agreeing to submit disputes under the Vienna Convention to the International Court of Justice, to refuse to effect compliance with an order of that Court in a case in which the United States has appeared, participated, and had a full opportunity to present its views.

It is critical to the rule of law for which the United States has stood since its founding that the ICJ's order be respected and implemented. Given the role of the United States in promoting the rule of law in the modern world, and the role of this

Court in promoting the rule of law in the United States, this Court should give effect to the ICJ Order, whether as a matter of treaty obligation or international comity.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioners' previous submissions in No. 97-1390 and plaintiffs' previous submissions in No. 97-____, the Court should grant (1) the petition for writ of certiorari; (2) the application and supplemental application for a stay of or injunction against the execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998; (3) the motion for leave to file an original complaint; and (4) the accompanying motion for provisional relief halting the execution.

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April 10, 1998

VIA EXPRESS MAIL

William K. Suter, Esq.
Clerk of the Supreme Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Republic of Paraguay v. Gilmore
(97-1390)

Dear Mr. Suter:

I enclose for filing the original and ten copies of the Republic of Paraguay's Supplmental Application for Stay of or Injunction against Execution in the above-referenced matter. We have enclosed ten copies because we understand that this application will be referred to the entire Court.

I also enclose one extra copy of the brief; I would appreciate your having this copy file-stamped and returned to me in the enclosed self-addressed, stamped envelope.

In the interest of time, this evening we had eleven fascimiles hand-delivered to the Court as courtesy copies. While the enclosed copies are identical in content to those delivered this evening, these conform to the Rules of the Court.

Thank you for your assistance.

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SUPREME COURT, U.S.

20525259.05

Sincerely yours,

Katherine Birmingham Wilmore

Katherine Birmingham Wilmore
(Awaiting admission)

Enclosures
cc: Donald R. Curry, Esq. (without enclosures)
Ara L. Tramblian, Esq. (without enclosures)
Seth P. Waxman, Esq. (without enclosures)
Paul Hoffman, Esq. (without enclosures)
Joseph D. Lee, Esq. (without enclosures)

DEBEVOISE & PLIMPTON

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April 5, 1998

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Republic of Paraguay, *et al.* v. Gilmore, *et al.*, No. 97-1390

Dear Mr. Suter:

On behalf of petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, we respectfully advise the Court that, on April 3, 1998, the Republic of Paraguay instituted proceedings in the International Court of Justice against the United States of America. Like its complaint in the District Court in this action, Paraguay's application to the ICJ alleges that Virginia officials violated the Vienna Convention on Consular Relations with respect to Angel Francisco Breard.

Also on April 3, 1998, Paraguay requested that the ICJ enter an order of provisional measures indicating that the United States ensure that Mr. Breard is not executed pending the ICJ's disposition of the case. The ICJ has scheduled a hearing on Paraguay's request for provisional measures for the morning of Tuesday, April 7, 1998. We understand that in letters dated April 3, 1998, the Vice President of the ICJ, Judge Christopher G. Weeramantry, has drawn the attention of the United States and Paraguay to the need "to act in such a way as will enable any Order the Court will make on the request for provisional measures to have its appropriate effects."

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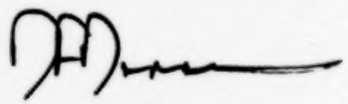
SUPREME COURT, U.S.

We have lodged with your Office under separate cover a copy of (a) the Application Instituting Proceedings Submitted by the Government of the Republic of Paraguay to the International Court of Justice, dated April 3, 1998; (b) the Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Paraguay to that Court, dated April 3, 1998; and (c) the press release issued by the ICJ on April 3, 1998, reciting the action taken by the Vice President of the ICJ.

Respectfully submitted,



Donald Francis Donovan

By telecopy and regular mail:
Donald R. Curry, Esq.
Ara L. Tramblian, Esq.
Joseph D. Lee, Esq.
Paul L. Hoffman, Esq.

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April 5, 1998

Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

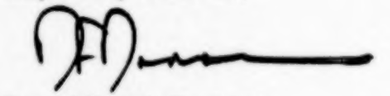
Republic of Paraguay, *et al.* v.
Gilmore, *et al.*, No. 97-1390

Dear Mr. Suter:

On behalf of petitioners the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José María Gonzalez Avila, we respectfully enclose the following documents for lodging with the Court:

- The Application Instituting Proceedings Submitted by the Government of the Republic of Paraguay to the International Court of Justice, dated April 3, 1998;
- The Request for the Indication of Provisional Measures of Protection Submitted by the Government of the Republic of Paraguay to that Court, dated April 3, 1998; and
- The press release issued by that Court on April 3, 1998.

Respectfully submitted,



Donald Francis Donovan

Enclosures

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Copy with enclosures:
Donald R. Curry, Esq.
Ara L. Tramblian, Esq.
Joseph D. Lee, Esq.
Paul L. Hoffman, Esq.

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY

TO: Mr. Eduardo Valencia-Ospina
Registrar
International Court of Justice
Peace Palace
The Hague
The Netherlands

Sir:

On behalf of the Republic of Paraguay and in accordance with article 40, paragraph 1, of the Statute of the Court and article 38 of the Rules of the Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Republic of Paraguay against the Government of the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to article I of the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.

Preliminary Statement

1. Article 36, subparagraph 1(b) of the Vienna Convention requires the competent authorities of a State Party to advise, "without delay," a national of another State Party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by article 36. "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner." *Id.*

2. As the Government of the United States stated in its Memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*:

> a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations. Article 36 establishes rights not only for the consular officer but, perhaps even more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others.

1980 I.C.J. Pleadings 174 (citations omitted).

3. In 1992, the authorities of the Commonwealth of Virginia, one of the federated states comprising the United States, detained a Paraguayan citizen named Angel Francisco Breard. Without advising Mr. Breard of his right to consular assistance, or notifying Paraguayan consular officers of his detention, as required by the Vienna

Convention, such authorities tried and convicted Mr. Breard and sentenced him to death.

4. These actions violated the obligations owed by the United States to Paraguay under the Vienna Convention. As a result of the breach, Paraguay is entitled to *restitutio in integrum*: the re-establishment of the situation that existed before the United States failed to provide the notifications and permit the consular assistance required by the Convention.

I. The Facts

Municipal Court Proceedings
Concerning Mr. Breard

5. On 1 September 1992, law enforcement authorities of Virginia arrested Mr. Breard on suspicion of murder. Although aware of Mr. Breard's Paraguayan nationality, the authorities at no time informed Mr. Breard of his rights to consular assistance under article 36, subparagraph 1(b) of the Vienna Convention. Nor did the authorities ever advise Paraguayan consular officers of Mr. Breard's detention. Unaware of, and not having been apprised of, these rights, Mr. Breard could not and did not exercise them before his trial.

6. Had Mr. Breard been properly informed of his rights under the Vienna Convention, he would have communicated with his Consul, seeking the assistance provided for in article 36. In turn, Paraguay would have rendered that assistance.

7. The failure to provide the notification required by the Vienna Convention thus precluded Paraguay from protecting its interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. Among other things, Paraguay could not contact its national, assist in the defense of its national (as described in paragraphs 8 and 10 below), monitor the conditions of its national's detention, or

ensure that international legal norms were respected in the treatment of, and proceedings against, its national.

8. The failure to provide the required notification also precluded Paraguay from protecting its national's interests in the United States as provided for in articles 5 and 36 of the Vienna Convention. The authorities of Virginia effectively prevented Paraguayan consular officers from arranging for appropriate legal representation of Mr. Breard. Instead, the authorities themselves arranged for Mr. Breard to be represented by court-appointed counsel who were unfamiliar with Paraguayan culture and with the preconceptions concerning the criminal justice system that a Paraguayan national might be expected to have.

9. As a result of the lack of consular assistance, Mr. Breard made a number of objectively unreasonable decisions during the criminal proceedings against him, which were conducted without translation. He refused to accept the authorities' offer of life in prison in exchange for his pleading guilty to the crime. Instead, Mr. Breard insisted on risking a death sentence and confessing and denouncing his past criminal conduct at trial. Mr. Breard took these highly detrimental steps because - in the absence of advice from his consulate - he did not comprehend the fundamental differences between the criminal justice systems of the United States and Paraguay. Whereas Mr. Breard believed his confession and denunciation would appeal to the mercy of the American court, as he understood they would a court in Paraguay, in reality these acts virtually assured Mr. Breard's conviction and death sentence.

10. Consular assistance would have included advice on cultural and legal differences between Paraguay and the United States, including the desirability of accepting or rejecting plea offers in light of those differences; an interpreter; appropriate additional or other legal counsel; identifying and communicating with family members who could provide assistance and information; supplying records, documents, and other evidence helpful to Mr. Breard's defense; transport of family members and other witnesses to Virginia to provide testimony; attendance by consular officers at court or other proceedings; collecting

and presenting mitigating evidence at the sentencing phase; and other forms of assistance both legal and non-legal. Such consular assistance would have affected the result of the criminal proceeding against Mr. Breard, including any sentence imposed.

11. On 24 June 1993, Mr. Breard was convicted of murder. On 22 August 1993, the trial court imposed a death sentence. Mr. Breard's direct appeals of the conviction and sentence were denied, as was his petition to the state courts for a writ of *habeas corpus*, a collateral proceeding seeking relief from unlawful detention.

12. In the Spring of 1996, Paraguay, without benefit of information from the authorities of Virginia and the United States, finally learned that Mr. Breard was imprisoned in the United States and awaiting execution. Immediately upon learning of his situation, Paraguay, through its embassy and consulate, began rendering assistance, both legal and otherwise, to Mr. Breard. Until contacted by the Paraguayan consular representatives at that time, Mr. Breard had been entirely unaware of his rights under the Vienna Convention.

13. On 30 August 1996, with the assistance of Paraguayan consular officers, Mr. Breard took the final step available to him for challenging his conviction and sentence by filing a petition to the federal court of first instance for a writ of *habeas corpus*. For the first time, Mr. Breard claimed violations of the Vienna Convention. That court rejected the assertion of this and other claims based on a municipal law doctrine of "procedural default." *Breard v. Netherland*, 949 F. Supp. 1255 (E.D. Va. 1996). Applying this doctrine, the court decided that, because Mr. Breard had not asserted his rights under the Vienna Convention in his previous legal proceedings, he could not assert them in the federal *habeas* proceeding. This municipal law doctrine was held to bar such relief even though, first, Mr. Breard was unaware of his rights under the Convention at the time of the earlier legal proceedings, and second, he was unaware of his rights precisely because the local authorities failed to comply with their obligations under the Convention promptly to inform him of those rights. The intermediate federal

appellate court affirmed. *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Mr. Breard's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to him as of right.

14. In light of the federal appellate court's affirmance of the federal trial court's denial of Mr. Breard's *habeas* petition, the Virginia court that sentenced Mr. Breard has set an execution date of 14 April 1998. Absent intervention, officials of Virginia will then, in the words of the authorizing statute, "cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance until he is dead." VA. STAT. ANN. § 53.1-234.

15. By petition for a writ of *certiorari*, Mr. Breard has now requested that the United States Supreme Court exercise its discretionary authority to review the lower federal courts' decision against him and grant a stay of his execution pending that review. The Supreme Court grants less than five percent of all *certiorari* petitions submitted to it. Moreover, in cases, such as Mr. Breard's, involving an imminent execution and submitted on an expedited basis, the Court frequently does not rule on the petition and accompanying request for interim relief until days, or even hours, before the scheduled execution.

Paraguay's Efforts To Secure
Relief In The United States

16. On 16 September 1996, the Republic of Paraguay filed its own civil lawsuit in a federal court of first instance against the municipal officials responsible for Mr. Breard's arrest, conviction, continuing imprisonment, and pending execution, alleging violations of the Vienna Convention. Paraguay sought, among other relief, an order vacating Mr. Breard's conviction, barring the municipal officials from taking any future actions based on that conviction, including refraining from putting Mr. Breard to death, and requiring those officials to afford Paraguay its

rights under the Convention in any future proceedings should Virginia, as Paraguay would expect, seek to prosecute Mr. Breard anew.

17. Paraguay did not seek from the federal court of first instance, and does not intend to seek from this Court, any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Mr. Breard if the competent authorities are so advised. Paraguay does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

18. On 27 November 1996, without having considered the merits of Paraguay's claim, the federal court of first instance held that it could not take jurisdiction of the case because it was barred by a municipal doctrine providing sovereign immunity to the several states that comprise the United States. *Paraguay v. Allen*, 949 F. Supp. 1269 (E.D. Va. 1996). Paraguay appealed the decision, which was affirmed. *Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). During the appellate proceedings, the United States took the position that although the Vienna Convention is of great importance to United States nationals abroad, the issue of its own violation of the Convention was not justiciable in the courts of the United States in an action brought by another State Party to the Convention.

19. Paraguay has filed a petition for a writ of *certiorari* in the United States Supreme Court seeking review of the appellate decision. As explained above, a petition for *certiorari* is a matter of the Supreme Court's discretion and is rarely granted.

20. In addition to its efforts to have its claim heard in the courts of the United States, Paraguay has also engaged in diplomatic efforts to gain the assistance of the United States in remedying the effect of the breach of the Vienna Convention. In a letter dated 10 December 1996, the Ambassador of Paraguay sought the good offices of the United States Department of State, "in order that a new trial may be granted

Paraguayan citizen Angel Breard within the framework of constitutional guarantees for proper defense against a criminal accusation as well as the strict fulfillment of the stipulations of international treaties covering acts of such nature." In a response delivered 3 June 1997, the Department of State expressed disagreement with Paraguay's legal position and offered no assistance to Paraguay in exercising its rights under the Treaties.

II. The Jurisdiction of the Court

21. Under article 36, paragraph 1 of the Statute of the Court, "[t]he jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force."

22. The Republic of Paraguay and the United States are, as members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and to its Optional Protocol Concerning the Compulsory Settlement of Disputes. Article 1 of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

23. Paraguay therefore submits that, upon the filing of the present application, the matters in dispute between Paraguay and the United States concerning Paraguay's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

III. The Claims of the Republic of Paraguay

24. The Government of the Republic of Paraguay claims that:

a. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to Paraguay, a State Party to the Convention, to inform "without delay" any Paraguayan national, such as Mr. Breard, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations.

b. Pursuant to article 36, subparagraph 1(b) of the Vienna Convention, the United States is under the international legal obligation to an arrested national of Paraguay, such as Mr. Breard, to inform him "without delay" of his rights under that subparagraph. These rights include:

i. the right, if the national arrested or detained so requests, to have the competent authorities of the receiving State inform the local consular post of the sending State that that State's national has been

so arrested or committed to prison or to custody pending trial or detained in any other manner;

ii. the right to have the competent authorities of the receiving State forward any communication "addressed to the consular post from the person arrested, in prison, custody or detention . . . without delay."

The United States has violated and is currently violating the foregoing obligations with respect to Mr. Breard.

c. Pursuant to article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Paraguay can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by article 36, subparagraph 1(b) of the Vienna Convention has effectively prevented Paraguay from exercising its right to carry out consular functions pursuant to articles 5 and 36 of the Convention. The United States therefore has violated and is currently violating the foregoing obligation.

d. Pursuant to article 36, paragraph 2, of the Vienna Convention and article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States is under an international legal obligation to ensure that its municipal law and regulations enable full effect to be given to the purposes of the rights accorded under article 36. The United States has violated and is currently violating the foregoing obligation.

e. Pursuant to article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or

judicial power. The United States has violated and is currently violating the foregoing obligation.

IV. The Judgment Requested

25. Accordingly, the Republic of Paraguay asks the Court to adjudge and declare:

(1) that the United States, in arresting, detaining, trying, convicting, and sentencing Angel Francisco Breard, as described in the preceding statement of facts, violated its international legal obligations to Paraguay, in its own right and in the exercise of its right of diplomatic protection of its national, as provided by articles 5 and 36 of the Vienna Convention;

(2) that Paraguay is therefore entitled to *restitutio in integrum*;

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default," or any other doctrine of its internal law, so as to preclude the exercise of the rights accorded under article 36 of the Vienna Convention; and

(4) that the United States is under an international legal obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against Angel Francisco Breard or any other Paraguayan national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or a subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) any criminal liability imposed on Angel Francisco Breard in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of Paraguay's national in violation of the United States' international legal obligations took place; and

(3) the United States should provide Paraguay a guarantee of the nonrepetition of the illegal acts.

V. JUDGE *AD HOC*

26. In accordance with the provisions of article 31 of the Statute and article 35, paragraph 1, of the Rules, the Republic of Paraguay declares its intention to exercise its right to name a judge *ad hoc*.

VI. RESERVATION OF RIGHTS

27. The Republic of Paraguay reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VII. PROVISIONAL MEASURES

28. The Republic of Paraguay requests that the Court indicate interim measures of protection, as set forth in a separate request filed concurrently with this Application.

* *

I have the honor to reassure the Court of my highest esteem and consideration.

Brussels, 3 April 1998

His Excellency Manuel María Cáceres
Ambassador of the Republic of Paraguay to
the Kingdom of Belgium and the
Kingdom of the Netherlands

CASE CONCERNING THE VIENNA CONVENTION ON CONSULAR RELATIONS

(PARAGUAY V. UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE REPUBLIC OF PARAGUAY

Brussels, 3 April 1998

1. I have the honor to refer to the Application submitted to the Court this day instituting proceedings in the name of the Republic of Paraguay against the Government of the United States of America and to submit, in accordance with article 41 of the Statute of the Court and articles 73, 74, and 75 of the Rules of the Court, an urgent request that the Court indicate provisional measures to preserve the rights of the Republic of Paraguay. The Court has jurisdiction pursuant to article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations.

2. The compelling facts underlying this request are set forth in the Application. On 1 September 1992, law enforcement officials of the Commonwealth of Virginia, one of the United States of America, arrested a national of Paraguay, Angel Francisco Breard. Mr. Breard was subsequently convicted and sentenced to death. At no time did these officials inform Mr. Breard of his right to communicate with his consulate, as required under article 36 of the Vienna Convention. Mr. Breard was and thus remained unaware of his rights under the Convention. As a result, Paraguay was not alerted to Mr. Breard's situation and was unable to exercise its right to render consular assistance until after he had already been tried, convicted, and sentenced.

3. Paraguay was therefore unable to protect its interests as provided for in articles 5 and 36 of the Vienna Convention. Similarly, it was unable to protect its detained national's interests as provided for in those articles.

4. As set forth in the Application, Paraguay submits that the actions of the Virginia officials, attributable to the United States, violated international legal obligations that the United States owes to Paraguay in its own right and in the exercise of its right of diplomatic protection of its national. As further set forth in the Application, Paraguay has requested that the Court declare that the United States has violated its obligations under the Vienna Convention; that the United States is obligated to restore the *status quo ante*; and that the United States is obligated to ensure that any future detention of or criminal proceedings against Mr. Breard or any other Paraguayan national in its territory be carried out in conformity with the international legal obligations the United States owes Paraguay.

5. By order dated 25 February 1998, the Circuit Court of Arlington County, Virginia, United States of America, has ordered that on **14 April 1998**, pursuant to Virginia Code § 53.1-234, Mr. Breard be electrocuted or injected with a lethal substance until he is dead.

6. The importance and sanctity of an individual human life are well established in international law. As recognized by article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law.

7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Paraguay in the life and liberty of its nationals, provisional measures are urgently needed to protect the

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life of Paraguay's national and the ability of this Court to order the relief to which Paraguay is entitled: restitution in kind. Without the provisional measures requested, the United States will execute Mr. Breard before this Court can consider the merits of Paraguay's claims, and Paraguay will be forever deprived of the opportunity to have the *status quo ante* restored in the event of a judgment in its favor.

8. On behalf of the Government of Paraguay, I therefore respectfully request that, pending final judgment in this case, the Court indicate:

a. That the Government of the United States take the measures necessary to ensure that Mr. Breard not be executed pending the disposition of this case;

b. That the Government of the United States report to the Court the actions it has taken in pursuance of subparagraph (a) immediately above and the results of those actions; and

c. That the Government of the United States ensure that no action is taken that might prejudice the rights of the Republic of Paraguay with respect to any decision this Court may render on the merits of the case.

9. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a Paraguayan citizen in violation of obligations the United States owes to Paraguay, Paraguay respectfully asks the Court to treat this request as a matter of the greatest urgency.

10. The Government of the Republic of Paraguay has authorized the undersigned to appear before the Court in any proceedings

or hearings relating to this request that the Court may convene in accordance with the terms of article 74, paragraph 3, of the Rules of the Court.

His Excellency Manuel Maria Cáceres
Ambassador of the Republic of Paraguay to
the Kingdom of Belgium and the
Kingdom of the Netherlands

International Court of Justice

Press Communiqué 98/13

3 April 1998

Paraguay brings a case against the United States of America and requests the indication of provisional measures Hearing to be held on Tuesday 7 April 1998

THE HAGUE, 3 April 1998. Paraguay today instituted proceedings against the United States of America before the International Court of Justice in a dispute concerning alleged violations of the Vienna Convention on Consular Relations of 24 April 1963 with respect to the case of Mr. Angel Francisco Breard, a Paraguayan national convicted of murder in Virginia (United States) who is due to be put to death on 14 April 1998.

Paraguay maintains that Mr. Breard was arrested, tried, convicted and sentenced to death without Virginia advising him of his right to assistance by the consular officers of Paraguay, as required by the Vienna Convention. It furthermore contends that Paraguayan consular officers were never notified by the United States of the detention of Mr. Breard, learning of it through third parties more than two years after his trial and sentencing.

Accordingly, Paraguay asks the Court to adjudge and declare that the United States has violated its international legal obligations under the Vienna Convention and that Paraguay is entitled to "restitution in kind", that is, the re-establishment of the situation that existed before the United States failed to provide the required notification.

As a basis for the jurisdiction of the Court, Paraguay invoked Article I of the Vienna Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes. Both Paraguay and the United States are parties to the Vienna Convention and to the Optional Protocol, Article I of which provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice".

"In view of the extreme gravity and immediacy" of the case, Paraguay also filed today an urgent request for interim measures of protection (provisional measures), asking the Court to indicate that the United States should refrain from executing Mr. Breard before the Court could consider Paraguay's claims. It requested that a hearing be held at the earliest possible date.

In letters dated today, Vice-President Weeramantry, exercising the functions of the presidency in the case and acting in conformity with Article 74, paragraph 4, of the Rules of the Court, drew the attention of both Parties to "the need to act in such a way as to enable any Order the Court will make on the request for provisional measures to have its appropriate effects".

He informed them that the Court would hold a public sitting on Tuesday 7 April 1998 at 10 a.m. to hear the observations of the Parties on the request for provisional measures.

Vice-President Weeramantry exercises the functions of the presidency in the case, President Schwebel being a national of the United States.

The full texts of the Application and of the request for the indication of provisional measures of Paraguay will soon be available on the Website of the Court (**http://www.icj-cij.org**).

NOTE FOR THE PRESS

1. The public sitting will be held in the Great Hall of Justice of the Peace Palace in The Hague, Netherlands. Mobile telephones and beepers are allowed in the courtroom **provided they are turned off or set on silent mode**. Any offending device will be temporarily retained.

2. Members of the Press will be entitled to attend on presentation of an admission card, which may be obtained upon application. The tables reserved for them are situated on the far left of the public entrance of the courtroom.

3. Photographs may be taken for a few minutes at the opening and at the end of the sitting. Television crews may film, but advance notice should be given to the Information Office (see paragraph 7).

4. In the Press Room, located on the ground floor of the Peace Palace (Room 5), the Court's proceedings will be relayed through a loudspeaker.

5. Members of the Press who wish to make telephone calls may use the phone located in the Press Room for collect calls or the public telephones in the Post Office in the basement of the Peace Palace.

6. Mr. Arthur Witteveen, Secretary of the Court (tel: 31-70-302 2336), and Mrs. Laurence Blairon, Information Officer (tel: 31-70-302 2337), are available to deal with any requests for information and for making arrangements for television coverage.

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EDITOR'S NOTE

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No. 97-1390

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

REPUBLIC OF PARAGUAY, et al.,

Petitioners,

V.

JAMES S. GILMORE III,

Governor of the Commonwealth of Virginia, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE STATEMENT *AMICUS CURIAE* OF INTERNATIONAL LAW PROFESSORS GEORGE A. BERMANN, DAVID D. CARON, ABRAM CHAYES, LORI FISLER DAMROSCH, RICHARD N. GARDNER, LOUIS HENKIN, HAROLD HONGJU KOH, ANDREAS F. LOWENFELD, W. MICHAEL REISMAN, OSCAR SCHACHTER, ANNE-MARIE SLAUGHTER, AND EDITH BROWN WEISS

IN SUPPORT OF PETITIONERS' SUPPLEMENTAL APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION

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5 pp

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IN SUPPORT OF PETITIONERS' SUPPLEMENTAL APPLICATION FOR STAY OF OR INJUNCTION AGAINST EXECUTION

International Law Professors George A. Bermann et al. respectfully request leave to file a Statement *Amicus Curiae* in support of Petitioners' Supplemental Application for Stay of or Injunction Against Execution. The interest of *Amici* is described in the Statement at pp. 1-2. Counsel for Petitioner has

consented to the filing of the Statement *Amicus Curiae*. Consent from counsel for Respondents has not been obtained. Counsel for *Amici* endeavored unsuccessfully to obtain Respondents' consent under the following circumstances:

On April 9, 1998, the International Court of Justice (ICJ) granted the request of petitioner Republic of Paraguay for provisional measures of protection running against the United States of America, respondent in the ICJ. That provisional measures ruling -- entered in the urgent circumstances of the scheduled execution of a Paraguayan national in the United States set to take place on April 14, 1998 -- triggered a number of new legal issues in which *Amici*, as professors of international law, have a special interest and expertise.

On April 10, 1998, counsel for *Amici* prepared a draft of the attached Statement of *Amici Curiae* and telephoned counsel for Petitioners and Respondents in order to secure their consent to the filing of the Statement. Although counsel for Petitioners did give consent, counsel for *Amici* was unable to obtain consent from counsel for Respondents. Counsel of record for *Amici*, Lori Fisler Damrosch, spoke to Mr. Donald R. Curry by telephone on the afternoon of April 10, 1998; his position was that the time for *amicus* filings had already closed and on that basis he withheld consent. Ms. Damrosch attempted to reach Mr. Ara L. Tramblian by telephone and learned from Ms. Ruth Barth of his office that he would be away from the office until Monday, April 13, 1998.

Amici respectfully urge that the ICJ's action of April 9,

1998 has decisively changed the legal situation; they therefore seek leave to file an *amicus* Statement for the purpose of bringing to this Court's attention the special considerations of international law that could not have been known to any of the parties or *Amici* prior to April 9, 1998. In view of the urgency of the execution date set for April 14, 1998, this motion is being filed forthwith so that the views of *Amici* may be brought to the attention of the Court in connection with the consideration of Petitioners' Supplemental Application for a Stay of or Injunction Against Execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lori Fisler Damrosch, counsel of record for *Amici Curiae* International Law Professors George A. Bermann et al., hereby certify that on April 13, 1998, I caused a copy of the Motion for Leave to File Statement *Amicus Curiae* of International Law Professors George A. Bermann et al. to be served by overnight mail upon and sent a copy also by telecopy to:

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American Branch, International Law Association,
and Lawyers Committee for Human Rights

Dated: April 13, 1998
New York, NY

Lori Fisler Damrosch

Lori Fisler Damrosch

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Interest of the Amici Curiae[1]

Amici are professors of law expert in the fields of international law and the application of international law by the courts of the United States, as more particularly set forth in the Appendix. *Amici* have special expertise concerning international tribunals, including the International Court of Justice (ICJ).

Under Article 38(1)(d) of the Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179 (hereinafter ICJ Statute), which is itself a treaty of the United States within the meaning of Articles II, III, and VI of the United States Constitution, the teachings of "the most highly qualified publicists of the various nations" are among the sources to be consulted in determining rules of international law applicable to disputes between states. The views of jurists on points of international law likewise are taken into account when such questions arise in U.S. courts. See, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 18 U.S. 153, 160-61 (1820).

Amici, through scholarship and practice before international and national tribunals, have contributed to the development of

[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that no party other than *Amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *Amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Since written consent to the filing of this *amicus* brief could not be obtained in the time frame relevant to the Supplemental Application for a Stay, a motion for leave to file under Rule 37.3(b) is being submitted simultaneously herewith.

jurisprudence on various questions related to the pending matter. *Amici* therefore seek leave to present their views to the Supreme Court of the United States concerning the significance of a ruling of the ICJ indicating provisional measures and the respect that should be accorded such a decision by courts in the United States, in the context of the present application to stay execution of a death sentence during the pendency of related proceedings at the ICJ.

Argument

On April 9, 1998, by a vote of 15 to 0, the International Court of Justice entered a ruling indicating provisional measures at the request of Paraguay in the Case Concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America). In its pleadings and its request for provisional measures, Paraguay claims that the United States has treaty-based obligations to advise the relevant consular office of Paraguay in the United States when one of Paraguay's nationals is arrested and detained in the United States; that these treaty obligations were not complied with in the case of Angel Francisco Breard, a Paraguayan national who was convicted of capital murder in the Commonwealth of Virginia and who is scheduled to be executed on April 14, 1998; and that the rights of Paraguay and its national will be irreparably prejudiced if the execution goes forward. The United States has appeared before the ICJ in the case and contested the indication of provisional measures. The ICJ's

provisional measures ruling now calls upon the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings."

The ICJ is the "principal judicial organ of the United Nations." U.N. Charter, 59 Stat. 1031, 3 Bevans 1153, Art. 92. It functions according to the ICJ Statute, which is annexed to the U.N. Charter and is an integral part thereof. According to Article 93 of the U.N. Charter, all Members of the United Nations, including the United States, are ipso facto parties to the ICJ Statute. Under Article 94(1) of the U.N. Charter, "[e]ach Member of the United Nations undertakes to comply with the decisions of the Court in any case to which it is a party." The United States accepted these obligations by ratifying the U.N. Charter as a treaty with the advice and consent of the U.S. Senate in accordance with Article II of the U.S. Constitution in 1945, and these undertakings remain fully in force as treaty obligations of the United States.

Jurisdiction of the ICJ is founded on principles of consent and reciprocity, as regulated by Article 36 of the ICJ Statute. The pending case arises under Article 36(1) of the ICJ Statute, establishing jurisdiction over "all matters specially provided for . . . in treaties and conventions in force." The Optional Protocol Concerning the Compulsory Settlement of Disputes, 21 U.S.T. 325, TIAS No. 6820, 596 UNTS 487 (hereinafter Optional Protocol), which accompanies the Vienna Convention on Consular

Relations, 21 U.S.T. 77, TIAS No. 6820, 596 UNTS 261 (hereinafter Vienna Convention), has also been ratified by the United States in accordance with Article II of the Constitution. Thus, both the Vienna Convention and the Optional Protocol are treaties in force for both the United States and Paraguay within the meaning of Article 36(1) of the ICJ Statute. Article I of the Optional Protocol provides:

> Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Paraguay, being such a party, has brought such an application.

The authority of the ICJ to enter provisional measures is established in Article 41 of the ICJ Statute, which provides:

1. The Court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

Jurisprudence of the ICJ has clarified the standards for issuance of a provisional measures ruling. The ICJ must determine first (without prejudice to further proceedings to dispose of any

jurisdictional objections) that the jurisdictional provisions relied on by the applicant state appear, prima facie, to afford a basis for the ICJ to exercise jurisdiction; in the present case, the ICJ has found such a prima facie basis in Article I of the Optional Protocol (paras. 23-34 of the provisional measures ruling). Second, the ICJ will not indicate provisional measures unless it finds that they are needed to prevent "irreparable prejudice" to a party's rights and that they are required by urgent circumstances; in this case, the ICJ has found that the requirement was satisfied by the imminence of the scheduled execution date for Mr. Breard and the impossibility of preserving Paraguay's rights should he be executed (paras. 35-37).

Amici contend that this Court should now stay the execution of Mr. Breard. The legal effects of provisional measures of international tribunals present issues of considerable jurisprudential significance which Amici and other scholars have addressed in depth in scholarly writings and before various tribunals. Under the circumstances of this case, there is no doubt that the measures ought to be complied with.[2] The motion

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[2] "A government that does not respect [a provisional measures ruling] may risk the following consequences, among others: . . .

> -- unfavorable inferences on jurisdictional or substantive issues that may arise in subsequent proceedings in that case (for example where either party alleges a breach of a duty to negotiate in good faith);
>
> -- losing the sympathy of the judges when they deal with other issues in the same case or other cases of interest to that government;
>
> -- weakening the credibility of its respect for law, including its ability to encourage respect for law by foreign states as well as its own citizens;

for a stay can and should be resolved in favor of Petitioner, in order to preserve these questions for full consideration by the appropriate tribunal -- whether that be this Court, the state or lower federal courts, or the ICJ.

The decision indicating provisional measures is directed to the United States government as a whole. In the view of *Amici*, necessary steps should be taken by all relevant U.S. officials -- whether executive or judicial, state or federal -- to ensure that the United States complies with the ruling. This position is shared by all *Amici*, regardless of any differences of views they may have concerning other issues involved in the present matter.

The United States is a frequent litigant at the ICJ, both as applicant and as respondent. The United States has initiated cases at the ICJ several times and has itself requested and received provisional measures in the past. In the Case Concerning U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran), 1979 I.C.J. 7 (Provisional Measures Order of Dec. 15); 1980 I.C.J. 3 (Merits Judgment of May 24), the United States requested and was granted an indication of provisional measures to ensure the safety of the U.S. hostages then being

---

> -- increasing the likelihood of criticism from foreign states directly or in the form of U.N. action; . . .
>
> -- weakening the legitimacy of its bargaining posture and deepening its dispute with the other party; . . .
>
> -- weakening the fabric of international relations on which it, along with other states, relies to maintain international order."

Bernard H. Oxman, "Jurisdiction and the Power to Indicate Provisional Measures," in The International Court of Justice at a Crossroads (Lori F. Damrosch, ed., 1987), at 323, 332-33.

held in Tehran. Indeed, in that case, the United States relied for jurisdiction on the very Optional Protocol that Paraguay has now invoked before the ICJ. And the Vienna Convention on Consular Relations on which Paraguay bases its claim was likewise one of the treaties invoked by the United States in the Tehran Hostages case. When the ICJ indicated provisional measures against Iran on December 15, 1979, the United States Government repeatedly insisted on Iranian compliance with the ICJ's decision and referred to it when issues concerning the international dispute arose in U.S. and foreign tribunals.

A stay should be granted to prevent irreparable harm to Petitioner. The irreparable harm if the execution is effected without plenary review by this Court is manifest. To permit the execution of a Paraguayan national, under circumstances alleged to entail breach of treaty rights and in derogation of a ruling from the ICJ entered to preserve those rights *pendente lite*, would work irreparable harm, not only to the Petitioner but also to the national interest.

Likewise, there are "compelling reasons" for this Court to exercise plenary review of "important federal questions" under the standards of Supreme Court Rule 10. On the only previous instance when a controversy was simultaneously pending before this Court and the ICJ, this Court did grant *certiorari*, and the ICJ thereafter dismissed the international proceeding. See Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); compare

Interhandel (Switzerland v. United States), 1957 I.C.J. 105 (Order of Oct. 24); 1959 I.C.J. 6 (Judgment on Preliminary Objections of Mar. 21). This Court's unanimous decision in that matter established lasting precedents on such important federal questions as how to take account of the legitimate interests of a foreign sovereign in matters of actual or potential interjurisdictional conflict.

Disregard of the ICJ's provisional measures ruling could impair the credibility of the United States not only in the case brought by Paraguay in the ICJ, but also in matters before other international bodies. Since the ICJ is part of the United Nations system, disregard of a ruling of the "principal judicial organ of the United Nations" could redound to the discredit of U.S. positions before other international judicial and arbitral tribunals, including the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Iran-United States Claims Tribunal, and the contemplated International Criminal Court.

Amici respectfully suggest that this Court should weigh the potential consequences for the United States of non-compliance with an ICJ provisional measures ruling and enter the appropriate orders to ensure that long-range interests in compliance with the rule of law are not unnecessarily undercut by a rush to carry out the judgment of the lower court.

This Court has repeatedly affirmed the need to undertake a "searching scrutiny" of state or local actions affecting U.S. foreign relations that may provoke consequences for the nation as

a whole. See, e.g., Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Zschernig v. Miller, 389 U.S. 429 (1968). When, as here, the ICJ has unanimously indicated provisional measures to prevent irreparable harm, the national interests of the United States are directly engaged. The matter has become sufficiently compelling that this Court should enter a stay. *Amici* urge this Court to ensure that actions of the authorities in Virginia -- actions which can easily be deferred for the temporary period necessary for an airing of the claims -- do not inadvertently cause incalculable and irreparable damage on the international plane. The grant of a stay is necessary to preserve the Court's ability to exercise its *certiorari* jurisdiction over this matter of compelling national importance.

Conclusion

However this Court rules, the present case will set a precedent regarding this Nation's respect for international law and for provisional measures rulings of the ICJ. This Court has the responsibility to determine the important federal questions raised by the petition, including issues arising under treaties of the United States and other aspects of international and federal law. For the reasons set forth above, this Court should enter the requested stay of execution to ensure respect for the provisional measures ruling of the ICJ.

Respectfully submitted,

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APPENDIX - IDENTIFICATION OF *AMICI*

George A. Bermann is the Charles Keller Beekman Professor of Law at Columbia University and an expert on the European Court of Justice and on international and transnational litigation.

David D. Caron is professor of law at the University of California at Berkeley and an expert on the Iran-United States Claims Tribunal.

Abram Chayes is Felix Frankfurter Professor of Law Emeritus at Harvard University and a former Legal Adviser to the U.S. Department of State (1961-1964).

Lori Fisler Damrosch is professor of law at Columbia University and editor of The International Court of Justice at a Crossroads.

Richard N. Gardner is Henry L. Moses Professor of International Law and Organization at Columbia University and former Ambassador of the United States to Italy and to Spain.

Louis Henkin is University Professor Emeritus at Columbia University and a past president of the American Society of International Law. He served as Chief Reporter for the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States and is the author of Foreign Affairs and the United States Constitution (2d ed. 1996).

Harold Hongju Koh is the Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale University and the author of The National Security Constitution.

Andreas F. Lowenfeld is the Charles L. Denison Professor of Law at New York University and the author of many books and articles

on international law and international litigation and arbitration. He was Associate Reporter for the American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States.

W. Michael Reisman is the Wesley N. Hohfeld Professor of Jurisprudence at Yale University, the author of many books and articles on international law and international arbitration and adjudication, and a former member and president of the Inter-American Commission on Human Rights.

Oscar Schachter is the Hamilton Fish Professor of Law and Diplomacy Emeritus at Columbia University, an honorary member of Institut de Droit Internationale, and a past president of the American Society of International Law.

Anne-Marie Slaughter is the J. Sinclair Armstrong Professor of International, Foreign and Comparative Law at Harvard University and an expert on international and supranational courts.

Edith Brown Weiss is the Francis Cabell Brown Professor of International Law at Georgetown University and a former president of the American Society of International Law.

CERTIFICATE OF SERVICE

I, Lori Fisler Damrosch, counsel of record for *Amici Curiae* International Law Professors George A. Bermann et al., hereby certify that on April 13, 1998, I caused a copy of the Statement *Amicus Curiae* of International Law Professors George A. Bermann et al. to be served by overnight mail upon and sent a copy also by telecopy to:

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Dated: April 13, 1998
New York, NY

Lori Fisler Damrosch

Lori Fisler Damrosch

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Supreme Court, U.S.
FILED
1998
OFFICE OF THE CLERK

THE REPUBLIC OF PARAGUAY, et al.,

Applicants

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, et al.,

Respondents

RESPONDENTS' SUPPLEMENTAL OPPOSITION

On April 9, 1998, the International Court of Justice (ICJ) at the Hague "indicated" what are called "provisional measures," stating that the United States "should take all measures to ensure" that the execution of Virginia death row prisoner Angel Breard, now set for April 14, 1998, is not carried out pending final judgment by the ICJ in Paraguay v. United States. The Republic of Paraguay now has brought the ICJ's action to the attention of this Court and argued that it is thereby entitled to a stay of Breard's execution.

This Court must reject the thrust of Paraguay's argument which casts this Court in a role clearly inferior to that of the ICJ and which encourages this Court to act as the ICJ's enforcement arm. This Court's authority to stay the execution of a State prisoner is strictly limited, and simply does not include the power to grant a stay while a foreign country litigates a case against the United States before an international tribunal, a case which ultimately can have no effect on the validity of Breard's conviction or on Virginia's power to carry out the punishment for his crimes. See Committee of United States Citizens v. Reagan, 859 F.2d 929, 940-942 (D.C. Cir. 1988) (ICJ judgment not binding because it "does not rise to the level" of a "norm from which no derogation is permitted").

Paraguay is asking this Court to stay a State prisoner's execution during the indeterminate number of years that Paraguay's action against the United States is likely to remain pending before the ICJ.[1] Such a far-fetched request must be denied because neither this Court, nor any other federal court, has the authority to stay a State prisoner's execution while he or someone else litigates a case in a foreign court. Once direct appeal has been completed, a federal court's sole authority to stay a State prisoner's execution is pursuant to 28 U.S.C. § 2251, in the context of ongoing federal habeas corpus proceedings.[2] See also Gomez v. United States District Court, 503 U.S. 653 (1992) (any request to stay a State prisoner's execution after he has litigated one federal habeas petition must satisfy the stringent rules governing successive petitions).

Moreover, even if this Court had the raw authority to grant a stay for such an inappropriate reason, the Court clearly should not take the extraordinary and unprecedented step of granting a stay of a State prisoner's execution for as long as an international tribunal – over which this Court

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[1] Virginia has been informed by the State Department that the typical ICJ action remains pending for more than five years prior to final decision. The fact that the ICJ has initiated what it regards as a "expedited" briefing schedule should be of no solace to the Court, and certainly is of no solace to Virginia. Requiring Paraguay to file its brief in June and the United States to file its brief in September hardly coincides with Virginia's view of "expedited." In any event, the ICJ has imposed no deadline on itself for decision and therefore a stay pending final judgment by the ICJ would be not only unauthorized, but intolerable. It simply makes no sense, moreover, to stay a State prisoner's execution pending the outcome of an international proceeding which ultimately can have no binding effect on the validity of his conviction or sentence. See Committee of United States Citizens, 859 F.2d at 940-942 (ICJ judgment not binding on United States).

[2] On direct appeal, this Court may stay a state court criminal judgment pending disposition of a certiorari petition. See 28 U.S.C. § 2101(f).

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APR. -13' 98(MON) 09:18 TEL:0 P.056

has no supervisory authority – may choose to take in reaching a decision. ***Indeed, it would be difficult to overestimate the harm that such a decision would cause to the interests of federalism, comity and finality that this Court has sought to foster in cases dealing with State prisoners.*** This is particularly true where, as here, the Court is being asked to stay the execution of a State prisoner who never even raised the underlying treaty claim in state court.

Even if Paraguay merely were asking the Court (as it did originally) to stay Breard's execution based on Paraguay's pending certiorari petition, the ICJ's action simply is irrelevant. Nothing the ICJ has done, or may do, can affect the applicable law regarding whether Paraguay can seek or obtain a stay of Breard's execution, and, clearly, it can do neither. (See Respondents' original opposition to stay motion). Indeed, Paraguay's case continues to suffer from the same fatal defect that has afflicted it from the outset: under our system of government, the federal courts have no authority to stay Breard's death sentence on the basis of someone else's lawsuit, and no power to stay Breard's death sentence even at his own request, except within the limited confines of a federal habeas proceeding. Thus, the ICJ proceeding in which Paraguay has filed a complaint against the United States can have no bearing on the federal courts' limited authority to stay a Virginia prisoner's execution.

Paraguay's supplemental stay request also should be rejected because it inappropriately asks this Court, rather than the Executive Branch, to control and conduct this Nation's foreign policy. The United States vigorously opposed Paraguay's action in the ICJ, as well as Paraguay's request for "provisional measures." Indeed, the United States argued forcefully that the ICJ had no jurisdiction to issue the "provisional measures" or to grant Paraguay's request to void Breard's capital murder conviction and death sentence. (See attached transcript of United States' oral

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presentation at ICJ at ¶¶ 3.9-3.13). The United States also has informed Paraguay that the alleged treaty violation in Breard's case had no substantial effect on his conviction or sentence.[3] (See respondents' original stay opposition at Resp. App. 8-10). Under these circumstances, the ICJ's "provisional measures" clearly constitute a non-justiciable "political question" and, while they may be dealt with by the Executive Branch, they certainly cannot serve as a basis for a federal court's stay of a State prisoner's execution. See generally Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations...[but] with all this the judicial courts have nothing to do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department").

Finally, even if Paraguay could overcome the insurmountable jurisdictional bar to the extraordinary relief it has requested, the Court nevertheless should reject Paraguay's incredible assertion that it somehow would be in "the national interest" of the United States for the federal courts to stay Breard's execution while the ICJ takes years to dispose of Paraguay's international complaint. (Supp. App. 10). Aside from the fact that Paraguay hardly is in a position to advise this Court or Virginia on the subject, it is impossible to see how it conceivably could be in this Nation's

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[3] The United States' presentation to the ICJ also made clear that, despite what Paraguay alleged, the trial prosecutor never offered Breard a plea bargain that would have spared him a death sentence. "Thus Paraguay's assumption that...Breard could have avoided the death penalty through a plea bargain does not withstand scrutiny." (See ICJ oral argument transcript at ¶ 2.24(8)).

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best interest for the federal courts to stay Virginia's execution of an admitted capital murderer on the basis of a treaty-based claim that the State prisoner never presented to a state court. Under such circumstances, the "comity" which this Court owes is to the final criminal judgment of the Commonwealth of Virginia, ***not*** to the Republic of Paraguay or to the ICJ.

CONCLUSION

For all the foregoing reasons and those set forth in the respondent's original opposition to Paraguay's stay motion, this Court should deny Paraguay's request to stay Angel Breard's execution.

Respectfully submitted,

JAMES S. GILMORE, III, GOVERNOR
OF VIRGINIA, et al.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 1998, a copy of the foregoing Supplemental Opposition was faxed to Donald Francis Donovan, Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022, counsel for applicants.

_____
Donald R. Curry
Senior Assistant Attorney General

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Uncorrected

Non-corrigé

CR 98/7

International Court of Justice
THE HAGUE

Cour internationale de Justice
LA HAYE

YEAR 1998

Public sitting

held on Tuesday 7 April 1998, at 10 a.m., at the Peace Palace,

Vice-President Weeramantry, Acting President, presiding

ANNEE 1998

Audience publique

tenue le mardi 7 avril 1998, à 10 heures, au Palais de la Paix,

sous la présidence de M. Weeramantry, vice-président, faisant fonction de président

in the case concerning the Application of the Vienna Convention on Consular Relations (Paraguay v. United States of America)

Request for the Indication of Provisional Measures

en l'affaire de l'Application de la convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique)

Demande en indication de mesures conservatoires

VERBATIM RECORD

COMPTE RENDU

Present: Vice-President Weeramantry, Acting President
President Schwebel

Présents : M. Weeramantry, vice-président, faisant fonction de président en l'affaire
M. Schwebel, president

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Judges Oda	MM. Oda
Bedjaoui	Bedjaoui
Guillaume	Guillaume
Ranjeva	Ranjeva
Herczegh	Herczegh
Shi	Shi
Fleischhauer	Fleischhauer
Koroma	Koroma
Vereshchetin	Mme Vereshchetin
Higgins	MM. Higgins
Parra-Aranguren	Parra-Aranguren
Kooijmans	Kooijmans
Rezek	Rezek,
Registrar, Valencia-Ospina	M. Valencia-Ospina, greffier

The Government of the Republic of Paraguay is represented by:

H. E. Mr. Manuel María Cáceres, Ambassador of the Republic of Paraguay to the Kingdom of Belgium and the Kingdom of the Netherlands, Brussels,

as Agent;

Mr. Donald Francis Donovan, Debevoise & Plimpton, New York,

Mr. Barton Legum, Debevoise & Plimpton, New York,

Mr. Don Malone, Debevoise & Plimpton, New York,

Mr. José Emilio Gorostiaga, Professor of Law at the University of Paraguay in Asunción and Legal Counsel to the Office of the President of Paraguay,

as Counsel and Advocates.

Le Gouvernement de la République du Paraguay est représenté par:

S. Exc. M. Manuel María Cáceres, ambassadeur du Paraguay au Royaume de Belgique et au Royaume des Pays-Bas, à Bruxelles,

comme agent;

M. Donald Francis Donovan, membre du cabinet Debevoise et Plimpton, New York,

M. Barton Legum, membre du cabinet Debevoise et Plimpton, New York,

M. Don Malone, membre du cabinet Debevoise et Plimpton, New York,

M. José Emilio Gorostiaga, professeur de droit à l'Université du Paraguay à Asunción et conseiller juridique de la Présidence du Paraguay,

comme conseils et avocats.

The Government of the United States of America is represented by:

Mr. David R. Andrews, Legal Adviser, United States Department of State,

as Agent;

Mr. Michael J. Matheson, Deputy Legal Adviser, United States Department of State,

Le Gouvernement des Etats-Unis d'Amérique est représenté par:

M. David R. Andrews, conseiller juridique du département d'Etat des Etats-Unis,

comme agent;

M. Michael J. Matheson, conseiller juridique adjoint principal du département d'Etat des

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Further, Paraguay does not contest in any way the authority of the United States or its constituent entities to enforce its criminal laws with respect to this or any other crime committed within its jurisdiction.

Paraguay does contend, however, that the competent authorities of the United States must enforce its criminal laws by means that comport with the obligations undertaken by the United States in the Vienna Convention.

That was not done in the case of Angel Breard.

Paraguay today requests that this Court indicate provisional measures to ensure that the possibility will remain for Paraguay to exercise its rights under that Convention in Mr. Breard's case.

Thank you.

The VICE-PRESIDENT: Thank you Dr. Gorostiaga.

The Court will now adjourn for ten minutes and resume again to hear the submissions of the United States.

The Court adjourned from 11.00 to 11.15 a.m.

The VICE-PRESIDENT: Please be seated. The Court now resumes its sitting to hear the submissions of the United States of America.

Mr. ANDREWS: Thank you Mr. President, Members of the Court. Before I begin my presentation I would like to express the pleasure of the United States delegation at seeing Judge Kooijmans again sitting with the Court.

1.1. Mr. President, it is again an honour to appear before the Court, although I regret that it must be in a matter so hurried and involving facts so unhappy as those involved here.

1.2. As the Court well knows, Paraguay filed this case four days ago. Because of Paraguay's decision to file at such a late date, the Court decided to hold a hearing today on Paraguay's request for provisional measures. Out of our respect for the Court, we have of course come here urgently to participate in these proceedings. This morning, we will present our reasons why the Court should not indicate provisional measures. Given the extraordinary haste of these proceedings, however, our presentations will be less fully developed than we would like. We regret the unfortunate circumstances that have led to this expedited proceeding, which prejudices not just the United States, but the ability of the Court to consider the issues before it fully and fairly. We likewise regret the fact that Paraguay has chosen to disregard the two-month period provided in the Optional Protocol to the Vienna Convention for the possible resolution of such disputes through conciliation or arbitration.

1.3. The facts of the criminal indictment underlying this ca·· are straightforward; indeed, we should all be clear that Mr. Breard unquestionably committed the offences for which he was tried. On 17 February 1992, Mr. Breard attempted to rape and then brutally murdered Ruth Dickie, a woman in Arlington, Virginia, a suburban jurisdiction across the Potomac River from Washington D.C. He was then arrested while attempting another rape. As we shall explain, genetic and other physical evidence

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linked Mr. Breard to the murder and the attempted rape. Indeed, ample evidence independent of his own testimony existed to prove that Mr. Breard committed these crimes. Mr. Breard was also implicated in a third sexual assault committed before he murdered Ms Dickie.

1.4. The Arlington police took Mr. Breard into custody and charged him with serious offences. The Commonwealth of Virginia has stipulated in United States court proceedings that the "competent authorities" did not inform Breard that, as a national of Paraguay, he was entitled to have Paraguay's consul notified of his arrest. Under Article 36 of the Vienna Convention on Consular Relations, the police were obliged to tell Mr. Breard that the consul could be so notified.

1.5. Mr. Breard had lived in the United States since 1986 and speaks English well, he was appointed experienced criminal defence counsel, and was able to maintain close and regular contact with friends and family. Given the circumstances and gravity of his crime, the jury recommended that he be sentenced to death, and the judge did so. Thereafter, Mr. Breard's attorneys brought a number of further actions in Virginia state courts and in United States courts seeking reversal of his conviction and sentence. This process has continued for almost five years, involving actions in different courts in the United States, including the United States Supreme Court, where Breard's request for certiorari — in other words, discretionary review by the Supreme Court — is still pending today.

1.6. As this Court knows, the indication of provisional measures is a serious matter which the Court is cautious in exercising. That is especially true in this case, where the Court is being asked to take action that would severely intrude upon the national criminal jurisdiction of a State in a matter of violent crime. Under the Court's jurisprudence, an applicant may only obtain the indication of provisional measures of protection in narrowly-defined circumstances, which the United States submits do not exist here.

1.7. The United States principal submission to the Court is that Paraguay has no legal recognizable claim to the relief it seeks and, for that reason, there is no prima facie basis for jurisdiction for the Court in this case, nor any prospect for Paraguay ultimately to prevail on the merits. Consequently, and in accordance with its jurisprudence, this Court should not indicate provisional measures of protection as requested by Paraguay.

1.8. Paraguay has no legally recognizable claim because Paraguay has no right under the Vienna Convention to have Mr. Breard's conviction and sentence voided. Paraguay in effect asks that this Court grant Mr. Breard a new trial — a right which would then presumably accrue to any other person similarly situated in the United States or in any other State which is a party to the Vienna Convention. The United States will show in these proceedings that this is not the consequence of a lack of notification under the Vienna Convention. The Court should not accept Paraguay's invitation to rewrite the Convention and to become a supreme court of criminal appeals.

1.9. Before describing the manner in which the United States will proceed in its presentation, I feel obliged to make a few comments about the issue of the death penalty in the United States. In a majority of the states of the United States (thirty-eight), including Virginia, voters have chosen through their freely elected officials to retain the death penalty for exceptionally grievous offences. Likewise, the United States itself authorizes the death penalty for exceptionally grievous federal offences. In practice, it is imposed, almost without exception, only for aggravated murder, as well as the case here. In all cases, the death penalty may be carried out only under substantive laws in effect at the time the crime was committed. All convictions and sentences involving the death penalty are subject to the extensive due process and equal protection requirements of the United States Constitution. They are also subject to exhaustive appeals at the state and federal levels, as has been the case with Mr. Breard.

1.10. When carried out in accordance with these safeguards, the death penalty does not violate international law. Capital punishment is not prohibited by customary international law or by any treaty to which the United States is a party. We recognize that some countries have abolished the death penalty under their domestic laws and that some have accepted treaty obligations to that effect.

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We respect their decisions. However, we also believe that in democratic societies, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people freely expressed and appropriately implemented by their elected representatives. Within the United States, legislative majorities nationally and in most of the constituent states have chosen to retain the option of capital punishment for the most serious crimes.

1.11. Many other countries likewise maintain capital punishment. On the same day that Paraguay filed this case, 3 April, the Commission on Human Rights in Geneva adopted a resolution that encouraged States that have the death penalty to establish a moratorium on executions. This resolution passed, but by a sharply divided vote of 26 in favour and 13 against, with 12 abstaining. This action reflects the diversity of views held in the international community concerning capital punishment.

1.12. Capital punishment is not the issue in the dispute between the United States and Paraguay. The actual issues are quite different. They are very narrow. They relate to the Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties.

1.13. As is customary, Mr. President, the United States will not read the full citations that support our arguments, but they are included in the texts provided to the Court and to opposing counsel. Further, I wish to note that the United States reserves the right to make additional arguments regarding issues of jurisdiction or the merits of this case that are not made today for purposes of this proceeding. Our presentation will proceed as follows. Ms Catherine Brown, the Department of State's Assistant Legal Adviser for Consular Affairs, will discuss the nature of the consular function and the practice of States with regard to consular notification and the remedies when notification is not provided. She will also describe in some detail the underlying facts of Mr. Breard's case and the efforts of the United States once it became aware of the case.

1.14. Ms Brown will be followed by Mr. John Crook, the State Department's Assistant Legal Adviser for United Nations Affairs. Mr. Crook will discuss the legal factors that should guide the Court in determining whether it should indicate provisional measures and will apply those factors to this case to show that provisional measures are not warranted. In doing so, he will discuss the text of the Vienna Convention, it negotiating history, and relevant subsequent practice.

1.15. Mr. Matheson, the State Department's Principal Deputy Legal Adviser and Co-Agent in this case, will address additional, prudential reasons for the Court not to issue provisional measures in this case, by noting the problems that would be created were the Court to assume the role asked by Paraguay.

1.16. After Mr. Matheson's presentation, I will return to the podium to provide a brief closing. Thank you, Mr. President. I ask you now to invite Ms Brown to the podium.

The VICE-PRESIDENT: Thank you Mr. Andrews. I give the floor now to Ms Catherine Brown.

Ms BROWN: Mr. President, Members of the Court,

2.1. It is a privilege and honor to be appearing before this Court for the first time.

2.2. My task is to explain to the Court the factual background of this dispute. I will review how the United States has responded to the concerns expressed by the Government of Paraguay, including the results of our investigation into the facts of Mr. Breard's case. First, however, I will address the nature of the consular function and the practice of States with regard to consular notification, in so far as those facts are relevant to the issues of this case.

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I. The Consular Function

2.3. The principal function of consular officers is to provide services and assistance to their country's nationals abroad. The Vienna Convention on Consular Relations, to which both the United States and Paraguay are parties, enumerates a wide range of general consular functions in Article 5. Article 36 addresses the specific issue of consular officers communicating with their nationals abroad.

2.4. Article 36, paragraph 1 *(a)*, provides that consular officials shall be free to communicate with their nationals and to have access to them. This case does not involve a deliberate interference with Paraguay's right to communicate with its national, Angel Breard. Moreover, since Paraguayan consular officials became aware of Mr. Breard's detention, they have been able to communicate and visit with him.

2.5. Article 36, paragraph 1 *(b)*, provides that a detained foreign national shall be permitted without delay to communicate with the relevant consular post and that competent authorities will advise the consular post of the foreign national's detention without delay if the detainee so requests. There is no serious question in this case that Mr. Breard could at any time have communicated with a Paraguayan consular official, either directly or through his family or his attorneys, had he known and chosen to do so.

2.6. Article 36, paragraph 1 *(b)*, concludes with the "consular notification" obligation that is at issue in this case: it provides that "the said authorities shall inform the person concerned without delay of his rights under this paragraph". Virginia authorities apparently did not so advise Mr. Breard, at the time of his arrest, or at any time prior to his conviction and sentence, that he could communicate with a consular official. But that does not mean that he was impeded or dissuaded from obtaining consular assistance. He, or his family, or his attorneys, might at any time have enlisted the assistance of a consul, as is frequently the case. The option of calling one's embassy or consul for help is widely known, and many governments advise their own nationals to call their embassy or consul in an emergency abroad.

2.7. Article 36, paragraph 1 *(c)*, provides that consular officials may visit their nationals in detention, converse and correspond with them, and arrange for their legal representation. Again, there was no deliberate effort to interfere with this right, and since becoming aware of Mr. Breard's detention Paraguayan consular officials have been able to visit and communicate with him. With respect to legal representation, arrangements were made by the State of Virginia for two clearly competent lawyers to represent Mr. Breard. Thus a consul proved unnecessary to perform this function.

2.8. Finally, Article 36, paragraph 1 *(c)*, concludes that a consular officer shall refrain from taking action on behalf of a national who is in prison if he expressly opposes such action. This provision is of particular interest here because Mr. Breard did not accept — indeed he adamantly resisted and even rejected — the advice not only of his attorneys, but also of his mother a Paraguayan national.

2.9. Several additional points are noteworthy. First, neither Article 5 nor Article 36 imposes any obligations on consular officers themselves. A consular officer may or may not choose to undertake any particular function on behalf of his countrymen. Consequently, the practice of States — and even of individual consuls — in assisting their nationals varies widely. Some countries are very active, while others are passive or even quite frankly uninterested or unable to provide any significant consular assistance. A country may have just one or two consular officials in a capital city, and none at a more remote location. A country's consular officials may make frequent prison visits or visit only selectively, if at all. Each country decides for itself what it will do. This in turn creates expectations among its nationals as to whether seeking consular assistance would be worthwhile.

2.10. Second, nothing in these Articles elevates the rights of foreign nationals above those of citizens of the host country. A foreign national is expected to obey the host country's laws, and is subject to its criminal justice system. Consular officers assist their nationals within this context. Consistent with this, Article 5 *(i)* of the Vienna Convention limits the rights of consular officers to represent or

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to arrange representation of their nationals before the tribunals of the receiving State. They may do so only "subject to the practices and procedures obtaining in the receiving State". The United States does not permit foreign consular officials to act as attorneys in the United States, nor may its own consular officers abroad act as attorneys for American citizens. We believe that this is the general practice of States.

2.11. Third, the Vienna Convention does not make consular assistance an essential element of the host country's criminal justice system. This is inevitable, given that consular officers have no obligations to act in any particular way vis-à-vis a host country's criminal justice system. A consul may do nothing at all, leaving the justice system to run its course. Or, the consul may visit the detainee; may ensure that the detainee's family is aware of the detention; may assist the detainee in securing counsel, if necessary; and may follow developments so that any questions about the fairness of the proceedings can, if appropriate, be discussed with host country officials. But the consular officer is not responsible for the defence because he cannot act as an attorney.

II. State Practice With Respect to Consular Notification

2.12. Two additional aspects of state practice are relevant: how faithfully do governments provide notification and what remedies, if any, are provided by governments for failures to notify? Because it is important that the United States respond appropriately to allegations of violations of consular notification, the Department of State recently made inquiries to all of our Embassies and, through them, directly to governments on these matters. While our information remains incomplete, we believe that it fairly reflects the range of state practice.

2.13. Practice with respect to notification: Compliance with respect to the obligation to notify the detainee of the right to see a consul in fact varies widely. At one end of the spectrum, some countries seem to comply unfailingly. At the other end, a small number seem not to comply at all. Rates of compliance seem partly to be a function of such factors as whether a country is large or small, whether it has a unitary or federal organization, the sophistication of its internal communication systems, and the way in which the country has chosen to implement the obligation. Countries have chosen to implement the obligation in different ways, including by providing only oral guidance, by issuing internal directives, and by enacting implementing legislation. Some apparently provide no guidance at all.

2.14. If a detainee requests consular notification or communication, actual notification to a consul may take some time. It may be provided by telephone, but sometimes a letter or a diplomatic note is sent. As a result there may be a significant delay before notification is received and, consequently, critical events in a criminal proceeding may have already occurred before a consul is aware of the detention. And, as noted previously, the consul may then respond in a variety of ways. For these reasons, and because of the wide variation in compliance with the consular notification requirement, it is quite likely that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems.

2.15. Practice with respect to remedies: Let me turn now to what our inquiries revealed about state practice with respect to remedies. Typically when a consular officer learns of a failure of notification, a diplomatic communication is sent protesting the failure. While such correspondence sometimes goes unanswered, more often it is investigated either by the foreign ministry or the involved law enforcement officials. If it is learned that notification in fact was not given, it is common practice for the host government to apologize and to undertake to ensure improved future compliance. We are not aware of any practice of attempting to ascertain whether the failure of notification prejudiced the foreign national in criminal proceedings. This lack of practice is consistent with the fact and common international understanding that consular assistance is not essential to the criminal proceeding against a foreign national.

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2.16. Notwithstanding this pracuce, Paraguay asks that the entire judicial process of the State of Virginia — Mr. Breard's trial, his sentence, and all of the subsequent appeals, which I will review momentarily — be set aside and that he be restored to the position he was in at the time of his arrest because of the failure of notification. Roughly 165 States are parties to the Vienna Convention. Paraguay has not identified *one* that provides such a *status quo ante* remedy of vacating a criminal conviction for a failure of consular notification. Neither has Paraguay identified any country that has an established judicial remedy whereby a foreign government can seek to undo a conviction in its domestic courts based on a failure of notification.

2.17. In the United States today, foreign nationals and the Government of Paraguay are attempting to have our courts recognize such a remedy as a matter of United States domestic law. But if our courts do so, the United States will become, as far as we are aware, the first country in the world to permit such a result. A number of foreign ministries have advised us that this result would certainly or most likely not be possible in their countries.

2.18. It is not difficult to imagine why such remedies do not exist. As noted, consular assistance, unlike legal assistance, is not regarded as a predicate to a criminal proceeding. Moreover, if a failure to advise a detainee of the right of consular notification automatically required undoing a criminal procedure, the result would be absurd. In particular, it would be inconsistent with the wide variation that exists in the level of consular services provided by different countries. But it would be equally problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. Doing so would require access to normally inviolable consular archives and testimony from consular officials notwithstanding their usual privileges and immunities. In this case, for example, one might wish to examine Paraguay's consular instructions and practices as of the time when Mr. Breard was arrested and inquire into the resources then available to Paraguay's consular officers. Surely governments did not intend that such questions become a matter of inquiry in the courts.

III. The United States Response To The Failure of Notification

2.19. Against this background, I would now like to advise the court of the steps taken by the United States relating to this case in an effort to be responsive to Paraguay's concerns.

2.20. The United States received official notice of Mr. Breard's case in April 1996 through a diplomatic note from Paraguay's Embassy in Washington. Significantly, the note did not allege a breach of the Article 36 consular notification obligation. It did not request consultations to discuss the case. It did not ask for any United States government intervention other than to facilitate efforts to obtain information from Virginia, which the Department of State did. The Department later learned, from Mr. Breard's attorneys, that those attorneys were attempting to challenge Mr. Breard's conviction based on an apparent failure of consular notification and litigation brought by Mr. Breard.

2.21. In September 1996, Paraguay filed suit against Virginia in a federal trial court. The suit sought to restore the *status quo ante* for Mr. Breard on the theory that only such action could vindicate Paraguay's governmental rights in consular notification.

The Department of State discussed the case with representatives of Paraguay in October 1996 and later received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Mr. Breard. That request failed to provide any evidence that consular law or practice would require such a result. Nevertheless, United States officials met with counsel for Paraguay about the matter and gave the issues raised by the suit careful consideration. Ultimately, the United States concluded that Paraguay's remedy for the consular notification failure lay in diplomatic communications with the Department of State. The United States so advised both the court in which Paraguay's case was

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pending and Paraguay's Ambassador. The United States did not object to Mr. Breard's own efforts to raise the consular notification issues in the courts, but neither did it support them.

2.22. On 3 June 1997, the Department received another letter from the Ambassador. I note that this letter is not referenced in Paraguay's Application to this Court. In it the Ambassador advised that Paraguay thought that the dispute should be resolved in the domestic courts of the United States, and not by this Court, but that Paraguay nevertheless would agree with the United States to come to this Court. This proposal was conditioned: the domestic United States proceedings should be stayed and the United States should waive any jurisdictional objections it might have to the jurisdiction of this Court and the United States should agree to require Virginia to accept this Court's decision. Like Paraguay's previous correspondence, this letter again failed to offer any serious explanation of why the remedy Paraguay was seeking was appropriate.

2.23. The Department of State nevertheless then decided to undertake an investigation into the case. In our investigation, we received the full co-operation of Virginia and we reviewed all facts relevant to the consular notification issue. This included the critical portions of the transcript, including Mr. Breard's testimony and an affidavit from his defence lawyers concerning their efforts on his behalf.

2.24. Through this process, we learned the following relevant facts:

(1) Mr. Breard unquestionably committed the offences for which he was tried. He was arrested while attempting a rape. Genetic and other physical evidence linked him to the earlier murder and attempted rape of Ruth Dickie. Ample evidence existed to prove that Mr. Breard committed these crimes, entirely independently of his own testimony. Indeed, nothing in Paraguay's submission suggests that Mr. Breard did not commit the crimes for which he was sentenced. Paraguay instead suggests that a consular officer might have persuaded Mr. Breard to make different tactical decisions;

(2) Mr. Breard had almost immediate and thereafter continuing contact with his family. He testified that one of the first phone calls he made at the time of his arrest was to his uncle. His mother and a cousin were involved in his defence, and his mother testified at his trial. Contacting family members is normally one of the first and most important things that a consular officer does when a national is detained, but here consular assistance to accomplish this proved unnecessary;

(3) Mr. Breard first came to the United States 1986 and thus had been resident in the United States for about six years at the time of his arrest. He had been married briefly to an American. This made it difficult to accept Paraguay's contention that Mr. Breard did not understand American culture;

(4) Mr. Breard had a good command of English. His lawyers had no difficulty communicating with him in English. He testified at his trial in English and the transcript of his testimony attests to his command of the language. Mr. Breard told the judge that he had no problems with English and was comfortable speaking it. Moreover, the state would have provided an interpreter had one been needed. Thus, Paraguay's implication that Mr. Breard was tried unfairly in a language he did not understand is demonstrably false. While a consular officer might help interpret for a detained foreign national, such assistance was not needed by Mr. Breard;

(5) Mr. Breard was represented by two criminal defence lawyers experienced in death penalty litigation. They spent at least 400 hours — the equivalent of 50 days — on his case. United States courts subsequently concluded that their legal representation met the requirements of the United States Constitution for the effective assistance of counsel. These attorneys worked closely with Mr. Breard, his mother, a female cousin, and his religious counsellor from jail, who was of Bolivian origin, to prepare his defence. They communicated with Mr. Breard's personal friends to find witnesses who could testify

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on his behalf. They communicated with persons in Paraguay to find evidence that would assist in his defence. They arranged for the court to appoint three experts to examine Mr. Breard's mental competence, and they obtained his medical records from Paraguay and from Argentina, so as to explore fully the possibility of an insanity defence and to develop mitigation evidence. Paraguay's assertion that it could have paid for witnesses from Paraguay appears irrelevant, because both his mother and cousin came from Paraguay to assist and there is no indication that there were other witnesses who were not used because of financial constraints;

(6) Mr. Breard decided to plead "not guilty" and to testify in both the penalty and sentencing phases of his trial contrary to the advice of his legal counsel and his mother — a strategy that was clearly unwise. This is the principal tactical decision Paraguay asserts it could have changed, but it is clear that Mr. Breard was advised against it by his own lawyers and his mother, yet rejected their advice. He was fully apprised of the risks of his strategy in the context of the American legal system. Access to a consular officer, who would have been less familiar with that system than his own lawyers, would not have made Mr. Breard's tactical decisions more informed;

(7) there is no credible evidence that Mr. Breard's decision to plead "not guilty" and testify was founded on a cultural misunderstanding. He was born and lived his early years in Argentina, he went to Paraguay for his secondary education and then he came to the United States to study English. As noted, he had been in the United States for six years and married to an American briefly. Significantly, as noted, his mother was also Paraguayan and yet she as a Paraguayan understood the error of his judgment well enough to advise him not to do what he did. And again, finally, his lawyers unequivocally explained to him that his strategy would not work. He signed a statement confirming that he was rejecting their advice and was not afraid of the outcome even if it resulted in a sentence of death;

(8) although Mr. Breard's legal counsel apparently thought that Breard had the opportunity to plead guilty in exchange for a life sentence, at best only very general preliminary discussions were held on this matter and they were never seriously pursued. Virginia officials have advised us that no actual offer of a plea agreement was ever made and that none would have been made, because of the strength of the government's case and the aggravated circumstances of the crime. Virginia would not affirmatively have agreed to a life sentence because under Virginia law a life sentence would have permitted Mr. Breard's future release. Thus Paraguay's assumption that Mr. Breard could have avoided the death penalty through a plea bargain does not withstand scrutiny;

(9) objective evidence indicates that the jury and the judge could easily have decided on the death penalty even if Mr. Breard had not testified. There was evidence that the murder was "aggravated" within the meaning of Virginia law, both by the "vileness" of the particular circumstances surrounding it and by the continuing danger that Mr. Breard posed to the community. This evidence supported imposition of the death penalty under Virginia law and the judge, who had to approve the jury's recommendation, would have known that a life sentence meant the possibility of future release;

(10) finally, Mr. Breard had the full protection of the criminal justice system. In addition to competent court appointed counsel, he had full judicial review. His conviction and sentence were reviewed and sustained by the Virginia trial court and the Virginia Supreme Court, and subsequently by a federal district court and a federal appeals court. The consular notification issue was being raised only after these procedures had been completed, in yet two more entirely separate legal proceedings.

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2.25. In July 1997, the Department reported the results of its investigation in a letter to the Ambassador. That also is not referred to in Paraguay's Application to this Court. Because it found no evidence of consular notification or access, the Department expressed deep regret that such notification apparently was not provided to Mr. Breard. The Department advised, however, that there was no basis for concluding that consular assistance would have altered the outcome. It further stated that it saw no appropriate role for this Court.

2.26. Significantly, the Government of Paraguay has never responded to that letter, either to contest its factual assumptions or to address the Department's conclusion that consular notification would not have made a difference. Even so, the United States has continued to have periodic communications and discussions about the case with Paraguay. These discussions included assurances given as recently as February of this year by senior Paraguayan government officials that they recognized that this case was unprecedented and unlikely to succeed. On 30 March, however, Paraguay unexpectedly advised the United States that it would file this suit unless the United States engaged in consultations and stayed Mr. Breard's execution. Still prepared to address in diplomatic channels any issues relating to consular notification, the United States agreed to engage in such consultations. The United States did so even though it was unable to stay the execution — which is in the hands of the United States Supreme Court and the Governor of Virginia — and even though it continues to believe that this Court is not an appropriate forum to address Paraguay's concerns.

2.27. In addition to these specific measures relating to Mr. Breard's case, the United States has also intensified its long-standing efforts to ensure that all federal, state, and local law enforcement officials in the United States are aware of and comply with the consular notification and access requirements of Article 36. Guidance on these requirements has been issued regularly by the Department of State for many years. Recently, however, the Department has issued a new and comprehensive guidance on this subject, along with a pocket-sized reference card for law enforcement officers to carry on the street. These materials have been personally provided by the Secretary of State to the United States Attorney-General and to the Governor of every state of the United States including, of course, Virginia. They have also been provided by the Department's Legal Adviser, Mr. Andrews, to every state Attorney-General, and they are being disseminated throughout the United States. In addition, the Departments of State and Justice have begun conducting briefings on these issues for state and federal prosecutors, and law enforcement officials, focusing particularly on areas with high concentrations of foreign nationals. Through these and other efforts, the United States is both acting to correct the circumstances that led to the failure of consular notification in Mr. Breard's case and acting in a manner consistent with state practice. Nothing more is required.

2.28. Mr. President, that concludes my factual presentation of the consular issues raised by this case. I thank the Court for its attention and invite it now to call upon Mr. Crook to speak.

The VICE-PRESIDENT: Thank you. Mrs. Brown. I call now on Mr. John Crook.

Mr. CROOK:

3.1. Mr. President, Members of the Court, it is again an honour and a pleasure for me to appear before you. My presentation will consider several important legal factors that should guide the Court in determining whether to indicate provisional measures in this case. I will show why, for a number of reasons, the Court should not indicate the measures requested by Paraguay.

I. The Significance of Provisional Measures

3.2. I must begin by underscoring the gravity and importance of the decision now before the Court.

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As the Court well understands, the indication of provisional measures is a matter of serious consequence. The decisions of this Court clearly show the need for caution before taking such action. This reflects, first of all, the impact on the authority and the responsibility of sovereign States that such measures may have. It also reflects the fact that such measures may be indicated only after hurried and incomplete proceedings, and that is particularly true here where the Court is sitting to hear a case that was filed less than 96 hours ago.

3.3. It is for such reasons that the Court and commentators have stressed the exceptional nature of the Court's provisional measures power. I refer the Court, for example, to its Order in the case concerning *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, (I.C.J. Reports 1976*, paras. 32 and 11) and, as Mr. Andrews indicated, the citations in all these matters are contained in the transcript we have handed to the Registry. Thoughtful opinions by individual Judges have examined the point in greater detail. I refer you to Judge Shahabuddeen's opinion in the case concerning *Passage Through the Great Belt (Finland* v. *Denmark), Provisional Measures, Order of 29 July, 1991, (I.C.J. Reports 1991*, p. 29); Judge Lachs in the *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, (I.C.J. Reports 1976*, p. 20); the dissenting opinions of Judges Winiarski and Badwi Pasha in the case concerning the *Anglo-Iranian Oil Co., Interim Protection, Order of 5 July, 1951, (I.C.J. Reports 1951*, p. 97) where they observed that "[m]easures of this kind in international law are exceptional in character to an even greater extent than they are in municipal law; they may easily be considered a scarcely tolerable interference in the affairs of a sovereign State". Judge Lachs, I think, well summed up the consequences in his separate opinion in the *Aegean Sea* case: "the Court must take a restrictive view of its powers in dealing with a request for interim measures".

3.4. The basic factors guiding the Court's decision whether or not to use its exceptional power to indicate provisional measures are laid down in the Statute of the Court. Article 41 envisions that the Court will carry out two separate, although inter-related, examinations. In the interests of time, I shall not read Article 41 but I would refer the Court to it, in particular Article 41(1).

3.5. As the Court will see, that text envisions two separate lines of enquiry. First, the Court's decision whether to indicate provisional measures is to be guided by an assessment of the overall context or circumstances of the case before it. Second, any measures to be indicated are of a nature"which ought to be taken to preserve the respective rights of either party". I shall consider each of these aspects in turn.

II. P visional measures are not warranted in these circumstances

3.6. I shall begin by showing how provisional measures are not warranted in these circumstances. Now Article 41 shows that the Court can and should consider the totality of circumstances involved in a case in deciding whether the indication of provisional measures is appropriate. Other members of the United States team are treating some particularly relevant circumstances. The Agent of the United States, Mr. Andrews, briefly addressed issues relating to the timing of this case. He noted the prejudice, both to the United States and to the judicial process, that follows from the Applicant's decision to file its case at the time it chose to do so. Ms Brown described the facts underlying Paraguay's claim, showing how it departs from the realities of international consular practice. She also showed how the failure to inform Mr. Breard of his right to consular access had no bearing on his trial, conviction and sentence. In our next presentation, Mr. Matheson will analyse yet other relevant circumstances, particularly the implications of this case for other States and for the Court.

3.7. My own discussion will be focused on two interrelated aspects of Paraguay's legal claim. First, I will show how the Court does not have jurisdiction to provide the remedy that Paraguay seeks in its Application. Then I will show how, in assessing whether to indicate provisional measures which may substantially prejudice the party against which they are directed, the Court must weigh the nature of

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the legal claims before it. The Court should not exercise its exceptional power to indicate provisional measures that prejudice the target State, where the moving Party's claims are legally unfounded or are unlikely to prevail.

3.8. Now as I shall show, particularly given the drastic consequences of Paraguay's basic legal claim — that the lack of consular notification invalidates each and every subsequent conviction of any alien in any State party to the Vienna Convention on Consular Relations — that claim should not prevail. Neither the Convention's language, nor its history, nor State practice supports it.

No Jurisdiction.

3.9. Because of the fundamental flaws that undermine Paraguay's claim for relief, the Court has no jurisdictional basis for the measures now requested. Now admittedly, the showing of jurisdiction at the stage of preliminary measures is less substantial than is required at later stages of the case. As the Court recently summarised in its Application of the Genocide Convention Order

> "[O]n a request for provisional measures, the Court need not, before deciding whether or not to indicate them, finally satisfy itself that it has jurisdiction on the merits of the case, yet it ought not to indicate such measures unless the provisions invoked by the Applicant . . . appear, prima facie, to afford a basis on which jurisdiction of the Court might be established." (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 11, para. 14.)

Although the burden of showing jurisdiction is lower now than it will be at later stages of this case, the Applicant still has a burden to meet. Paraguay has not met that burden.

3.10. Article I of the Optional Disputes Settlement Protocol to the Vienna Convention on Consular Relations gives the Court jurisdiction over disputes arising out of the "interpretation or application" of the Convention. However, there is no dispute here about either the interpretation or the application of the Convention. The Parties do not disagree on what it means to "inform" a foreign national of his rights under Article 36, paragraph 1 *(b)*, of the Convention. Nor do they dispute that Mr. Breard was not so informed.

3.11. Instead, Paraguay's claim in this case, in essence, is that under the Vienna Convention the Court can void Mr. Breard's criminal conviction and sentence, and require that he be given a new trial. As I will show, the Vienna Convention does not provide for such an extraordinary form of relief. Paraguay may object to the appropriateness of a criminal conviction and sentence under United States law and practice, but this is not a dispute about the interpretation or application of the Vienna Convention.

3.12. Paraguay tries to meet this difficulty by invoking the doctrine of *restitutio in integrum* (Paraguay's Application, p. 11, para. 25). Paraguay cannot, however, create a right that does not otherwise exist under the Vienna Convention on Consular Relations — the Court's sole basis for jurisdiction in this case — simply by invoking a general principle of the law on reparation. Paraguay has failed to make a prima facie showing that the Court has jurisdiction to grant the exceptional relief it seeks here. Under the circumstances, under the Court's well-settled jurisprudence, there is no jurisdictional basis for the Court to indicate provisional measures.

3.13. In this respect, this situation is similar to that faced by the Court in the provisional measures phase of the *Lockerbie* case (case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Order, 14 April 1992*, Request for the Indication of Provisional Measures, para. 43) There, the Court found, as a prima facie matter, that there was no legal basis for the Libyan claim under the Montreal Convention because of the adoption of a resolution of the Security Council. The Court therefore rejected Libya's request for provisional measures because "the rights claimed . . . under the Montreal Convention

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cannot now be regarded as appropriate for protection by the indication of provisional measures". In a similar way here, there is no legal basis for the rights that are claimed by Paraguay. Those claims too are not an appropriate basis for the indication of provisional measures.

The Merits of Paraguay's Claim.

3.14. Obviously, the Court cannot consider the merits at this stage in a case that is 96 hours' old. Nevertheless, in addition to assessing whether it has jurisdiction to proceed, the Court must weigh the totality of circumstances bearing on Paraguay's request for preliminary measures. In so doing, the Court must consider the doubtful nature of the core legal proposition that Paraguay is advancing — that the Convention requires the invalidation of every conviction and sentence of any person who has not received consular notification required by the Convention.

3.15. The difficulties with Paraguay's legal position must be confronted at this stage, and this ought to be an important element in assessing the appropriateness of provisional measures. As Dumbauld wrote at the time of the Permanent Court, "if it is apparent that the applicant cannot succeed in his main action, preliminary relief will of course be denied" (Edward Dumbauld, *Interim Measures of Protection in International Controversies* 165 (1932).

A. Plain Meaning of the Text

3.16. What are the legal difficulties? To begin with, Paraguay's claim conflicts with the plain meaning of the text. Absolutely nothing in the language of Article 36, paragraph 1, of the Vienna Convention on Consular Relations (or in any other Article of the Convention) offers support for Paraguay's claim that failure of consular notification requires invalidation of any subsequent conviction and sentence of an alien.

3.17. Paraguay's claims follow from Article 36, paragraph 1, of the Vienna Convention, to which both the United States and Paraguay are parties. Article 36 establishes the basic régime for consular assistance to nationals who may be detailed in the receiving State.

Article 36, paragraph 1, provides:

> "1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested . . . shall also be forwarded to the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph."

3.18. Mr. President, as was described by Ms Brown, when the competent federal authorities learned that Mr. Breard may not have been told when he was arrested that Paraguay's consul could be notified, the United States authorities investigated thoroughly. When they concluded that a violation of Article 36, paragraph 1, probably had occurred, they took action in co-operation with the Commonwealth of Virginia to try to prevent any recurrence. Senior United States officials apologized to Paraguay, and offered further consultations. As Ms Brown just noted, when Paraguay

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recently proposed that the two sides enter into formal consultations, the United States promptly agreed to that proposal. Unfortunately, however, and notwithstanding Article II of the Optional Disputes Settlement Protocol to the Convention, Paraguay chose to bring its action here instead.

3.19. Thus, there is no legal dispute between the United States and Paraguay regarding the need to give notification as provided for under Article 36, that such notification was not given, and concerning the need to take effective steps to prevent recurrence. The sole issue concerns the consequences under international law if an arrested alien is not told that his consul can be notified. The United States contends that the solution to such a breach of the treaty's requirements is to be pursued through normal processes of diplomatic apology, consultation and improved implementation.

3.20. Paraguay, however, asks this Court to impose much more drastic consequences. Paraguay's Application maintains that the necessary legal consequence for any such breach is that the ensuing conviction and sentence must be put aside. There is absolutely no support for this claim in the language of the Convention. The Court should not read into a clear and nearly universal multilateral instrument such a substantial and potentially disruptive additional obligation that has no support in the language agreed by the parties.

3.21. Mr. President, there are very few situations in which States actually have agreed by treaty that the failure to observe specific standards can be the basis for appeal to an international tribunal for possible reversal of a conviction or sentence. I have in mind here, for example, regional instruments and institutions such as the European Convention on Human Rights and the Strasbourg Court. Where States have elected to create such mechanisms, they have done so expressly and with great precision. They have not created such additional remedies by indirection or implication, as Paraguay asks the Court do here. Let me return to the negotiating history.

B. Negotiating History

3.22. Likewise, there is no support for Paraguay's claim there. We know of nothing in the history — and Paraguay has pointed to nothing — even hinting that the Parties intended failure to comply with Article 36, paragraph 1, to invalidate subsequent criminal proceedings.

3.23. The Vienna Convention was negotiated on the basis of draft articles prepared by the International Law Commission. The relevant ILC proposals do not contain the obligation to inform an arrested person that their consul could be notified. That was added at the Conference. We have found nothing in the debates of the conference supporting Paraguay's claim, but there are a number of indications to the contrary.

3.24. Article 36 was negotiated with great difficulty at the Vienna Conference. The final version was only agreed upon two days before the Conference ended. Some delegations supported the ILC's initial draft of Article 36, which would have required that receiving States automatically notify sending States' consuls if a national was arrested. A large number of other States strongly opposed this requirement. They argued, among other things, that it would impose an excessive administrative burden on the receiving State and that the national might not want his government authorities to know about his arrest. (Luke T. Lee, *Consular Law and Practice* (1990), pp. 138-139.)

3.25. Ultimately, a compromise had to be reached. The compromise involved a series of amendments to the ILC draft. I will not try to trace all of these for you, but I will mention one because it helps to show that States at the Conference clearly did not intend that failure of consular notification would invalidate subsequent legal proceedings. The negotiations began with the ILC draft providing for consular notification in the case of arrest. That was widely criticized as unreasonably burdensome and impractical. Accordingly, various narrowing amendments were offered by groups of countries.

3.26. One, offered by Egypt and accepted by the Conference, changed the initial language to state that the obligation to inform the sending State only arises if the national so requests. The delegate of

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Egypt explained his amendment as follows:

> "The purpose of the amendment is to lessen the burden on the authorities of receiving States, especially those which had large numbers of resident aliens or which received many tourists and visitors. *The language proposed in the joint amendment would ensure that the authorities of the receiving State would not be blamed if, owing to the pressure of work or other circumstances, there was a failure to report the arrest of a national of the sending State.*" (Twentieth Plenary Meeting on 20 April, 1963, United Nations Conference on Consular Relations, Official Records, p. 82, at para 62. Emphasis added.)

The explanation of this amendment (which was adopted by the Conference) clearly suggests that the Conference saw the normal processes of diplomatic adjustment as the means to address failure of a notification requirement. The Conference did not foresee that defects of consular notification would result in the invalidation of subsequent criminal proceedings. Had the parties thought so, the many States that already expressed fears about the burden of the notification requirement would surely have voted down the text that is before you today.

3.27. Other statements during the Conference reinforce that the Parties did not intend the Convention to alter the operation of domestic criminal proceedings. The delegate from the USSR stated that "the matters dealt with in Article 36 were connected with the criminal law and procedure of the receiving State, which were outside the scope for the codification of consular law" (*ibid.*, p. 40, para. 3). The delegate from Belarus expressed similar views, noting that "the Conference was drafting a consular convention, not an international penal code, and it had no right to attempt to dictate the penal codes of sovereign States" (*ibid.*, p. 40, para. 8). Such statements directly conflict with Paraguay's claim today. Thus, the negotiating history does not support Paraguay's broad view of the consequences of non-compliance with Article 36, and a variety of statements made during the debate support a contrary view.

C. State Practice

3.28. Likewise, there is no support in state practice for Paraguay's position. As Ms Brown explained, after the Breard case initially came to the attention of the United States federal authorities, the United States Department of State surveyed the practice of the States parties to the Vienna Convention. That survey found no State — none — that adopted the position Paraguay urges on the Court here. Paraguay has referred to no such State practice here.

3.29. The few national court cases that we know have considered the matter have not reached the result urged by Paraguay. Lee's treatise *Consular Law and Practice* cites an Italian case where the Italian authorities failed to provide the required consular notice to Yater, a British national. According to Lee, the challenge to Yater's conviction was rejected.

> "The Supreme Court *(Cassazione)* held that the consular role in assisting the defence of his fellow nationals under the Vienna Convention on Consular Relations is of 'a complementary and subsidiary nature, and does not replace the right of the accused to make his own arrangements for his own defence'. Since Yater in this case had adequately defended himself during proceedings through a lawyer chosen by him, the plea was dismissed." (Luke Lee, *Consular Law and Practice* p. 150-151, citing *Cassazione*, 19 Feb. 1973, *re Yater*. Summary and Commentary in 2 *Italian Yb. Int'l L.* 336-9 (1976).)

The issue also has been energetically litigated in United States courts. Indeed, Mr. Donovan, the distinguished counsel for Paraguay, has been a prominent participant in litigation in the United States urging that this approach be adopted as a matter of United States domestic law. However, no United States court has found that the failure of consular notification, standing alone, constitutes a sufficient basis for invalidating a sentence and conviction.

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D. No Injury to Mr. Breard

3.30. Finally, as Ms Brown has explained, the notion that Mr. Breard suffered injury because of any failure of consular notification is speculative and unpersuasive. Paraguay's Application asks this Court to indicate provisional measures largely on the basis of some bold assumptions about what Paraguay's consul might have done. In doing so, the Application presents an inflated and unrealistic description of a consul's functions in criminal matters. A consul is not a defence attorney. Consular protection does not immunize a national from local criminal jurisdiction. What a consul can do is help arrested persons arrange means for their own defence. A consul can notify an arrested person's family, or help to ensure that the defendant has local defence attorneys. A consul does not typically retain lawyers to defend her nationals; the United States does not do so, and Paraguay has not established that it normally does so either.

3.31. But, as we have shown, Mr. Breard was able to accomplish all these things quite effectively without the assistance of Paraguay's counsel without the assistance of Paraguay's consul. He spoke English and had lived in the United States since 1986. After his arrest, he was in regular contact with his family. He was defended by able attorneys throughout his trial and the many subsequent legal proceedings. A consul could not have done more to enhance the effectiveness of Mr. Breard's legal defence.

E. Conclusion

3.32. For all of these reasons — the lack of any textual basis in the Convention, the lack of support in the negotiating history and State practice, and the absence of injury to Mr. Breard — Paraguay's basic claim in these proceedings lacks legal foundation. Because there is no basis for the remedy Paraguay seeks in the Convention, the Court lacks jurisdiction. The weakness of Paraguay's legal claim is also a compelling reason for declining to indicate provisional measures.

III. Provisional Measures and The Rights of the Parties

3.33. Mr. President, my final section, will be relatively brief. I will first address the role of provisional measures in relation to the protection of the rights of the Parties. I will explain why such measures should not be indicated in a form that would create a selective or unjust balance with regard to the Parties. I will then show how, in deciding whether to indicate particular provisional measures, the Court must consider whether those measures improperly prejudge the outcome of the dispute.

3.34. Mr. President, the provisional measures sought by Paraguay amount to a determination on the merits of this case. If the measures sought by Paraguay are indicated and implemented, Paraguay will have won, at least for a period of however many years may be required for the Court to arrive with its final judgment. Paraguay will have advanced its key objective through a hurried and unbalanced proceeding that cannot adequately address the serious legal issues that are at stake.

3.35. This cannot be reconciled with the régime for provisional measures envisioned under Article 41 of the Statute. Article 41 says that the Court may indicate, where circumstances require, "any provisional measures which ought to be taken to preserve the respective rights of either party". Take note: "the respective rights of either party". Provisional measures should not protect the rights of one party, while disregarding the rights of the other. But that is precisely what is requested here. As Paraguay has made clear, its goal here is to prevent the operation of the criminal laws of the Commonwealth of Virginia. It seeks to do so where there is no doubt that the accused committed very grave and violent offences, and where there have already been five years of extensive appellate litigation in national courts. As Mr. Matheson will elaborate in our next presentation, this would significantly impair the rights of the United States to the orderly and conclusive functioning of its

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criminal justice system.

3.36. Moreover, provisional measures should not be indicated in terms or in circumstances where they constitute a disguised adjudication on the merits. Professor Rosenne makes this point strongly in his remarkable new treatise:

> "The power to indicate provisional measures cannot be invoked if its effect would be to grant to the applicant an interim judgment in favour of all or part of the claim formulated in the document instituting proceedings." (Shabtai Rosenne, *The Law And Practice of the International Court, 1920-1996*. Vol. III. p. 1456.)

Nevertheless, this is precisely what Paraguay seeks. Paraguay is asking this Court for a concealed adjudication on the merits of this case through the guise of provisional measures.

3.37. This is exactly the type of case Judge Oda warned of in his recent essay on provisional measures. As he wrote:

> "In recent cases, the actual matters to be considered during the merits phase have been made the object of the requested provisional measures . . . [T]he applicant States appear to have aimed at obtained interim judgments that would have affirmed their own rights and preshaped the main case." (Oda, "Provisional Measures. The Practice of the International Court of Justice," *in Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Lowe and Fitzmaurice, eds., p. 553.)

3.38. Judge Oda goes on to warns of the implications of this, and of the possibility that:

> "the Court . . . be tempted to deliver an interim judgment under the name of provisional measures . . . If the tendency is to be for the Court to arrive at a quick decision on matters relating to the merits, while reserving for the future other much more judicious consideration on the question of jurisdiction as well as the merits . . ., then the whole matter requires very careful consideration." (*Ibid.*, p. 554.)

3.39. Mr. President, Judge Oda is right to be concerned, this whole matter does require very careful consideration. Provisional measures should not be used as a vehicle for a hasty and legally unjustified decision on the merits of Paraguay's claim. And thus, for all of the reasons I have indicated — because of the lack of jurisdiction, because Paraguay's claim is unsound in law, and because the requested provisional measures are unbalanced and improperly prejudge the merits, the Court should reject Paraguay's request.

3.40. I thank the Court for its attention during a long presentation. I now ask that it invite Mr. Michael Matheson, Principal Deputy Legal Adviser, to present the next section of our argument.

The VICE-PRESIDENT: Thank you Mr. Crook. Mr. Matheson has the floor.

Mr. MATHESON:

4.1. Mr. President, distinguished Members of the Court, it is once again my great honour and privilege to appear before you on behalf of the United States. Mr. Crook has explained the basis for our contention that the provisional measures sought by Paraguay are not within the jurisdiction of the Court and lack any legal foundation. I will now explain the reasons for our view that the granting of the provisional measures sought by Paraguay would be contrary to the interests of the parties to the Vienna Convention on Consular Relations, the international community as a whole, and the Court as well.

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4.2. Article 41 of the Statute of the Court provides in part that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken . . .". This language clearly indicates that the Court may or may not choose to exercise this power in a particular case, depending on whether it believes the circumstances require it and whether it believes the particular measures proposed ought to be taken. (See, for example. *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976*, separate opinion of President Jiménez de Aréchaga, p. 16.)

4.3. It follows from this that the Court should only grant provisional measures where it is satisfied that this would not only be fair and beneficial to the parties to the immediate dispute, but also would be consistent with the proper role of the Court, the interests of the Parties to the convention in question, and the good of the general international community.

4.4. In the present case, Paraguay has asked the Court to suspend decisions of the criminal courts of a State. To our knowledge, this is the first occasion on which the Court has been asked to do so. In its request for provisional measures, Paraguay has asked the Court, in a matter of a few days, to scrutinize and suspend for an indefinite period the considered decisions of the trial and appellate courts of Virginia and the United States — decisions that have been taken after extensive judicial proceedings over a period of years.

4.5. This would be a very serious step, and one which could threaten serious disruption of the criminal justice systems of the parties to the Vienna Convention, and of the work of this Court as well.

4.6. There are currently over 160 parties to the Vienna Convention, of which over 50 have adhered to the Optional Protocol on Compulsory Settlement of Disputes. The Parties to the Protocol include a number of populous States, such as France, Germany, India, Japan, the United Kingdom and the United States, where very large numbers of foreign nationals have immigrated or travelled for various reasons. It is inevitable that a significant number of crimes will occur in any population group of such a size, and in fact this has occurred. It is also to be expected that in a number of these cases, law enforcement authorities may commit, or be alleged to have committed, errors in the process of consular notification called for under the Vienna Convention.

4.7. The question is not whether such errors should be remedied. Rather, it is whether this should be left to the diplomatic process and to the domestic criminal authorities of the State in question, or whether this Court should assume the role of a supreme court of criminal appeals to deal with such cases by staying, reviewing and reversing domestic court decisions. Once the Court opens itself to this process, it can be expected that a great many defendants will press the States of their nationality to take recourse to it. This would include not only those who received no consular notification at all, but also those who may wish to claim that the notification received was deficient, incomplete, or tardy. It would include not only those who were genuinely prejudiced by the failure of consular notification, but also those who suffered little or no prejudice because they were nonetheless accorded full assistance of competent counsel and all the requirements of due process.

4.8. In principle, if such a remedy were available for violations of the Vienna Convention, why would it not also be available for alleged violations of other conventions when committed against foreign nationals in detention for criminal offenses, such as bilateral treaties with provisions for consular protection, the International Covenant on Civil and Political Rights, or other agreements with provisions concerning rights to be accorded to aliens or to any person accused of criminal offences? If States may ask this Court to stay executions and nullify convictions on the basis of violations of the Vienna Convention, would they not feel able to do so under these other agreements as well?

4.9. It is difficult to believe that the parties to these conventions really intended that this Court serve as a supreme court of criminal appeals in this manner. It is difficult to believe that they intended to

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subject their domestic criminal proceedings, which typically include both trial proceedings and one or more levels of appellate review, to yet another stage of review by an international tribunal. As Mr. Crook demonstrated, we know this was not the case with respect to the Vienna Convention. We also know that such a role was not contemplated by the framers of the United Nations Charter and the Statute of the Court.

4.10. Yet this is precisely the message that the Court would give in granting the provisional measures sought by Paraguay in the present case. Delay of the execution of Mr. Breard until the Court's final disposition of the case, as Paraguay requests, would in practice mean the suspension of domestic criminal proceedings for years, whatever the final outcome. Many other defendants in many States could be expected to demand the same treatment, whether the alleged violations were serious or minor, and whether or not those violations led to any significant failures of due process in their conviction.

4.11. In other words, the indefinite stay of execution requested by Paraguay would not be a minor measure that simply preserves the status quo. It would be a major and unprecedented intrusion by the Court into the domestic criminal process that could have far-reaching and serious effects on the administration of justice in many States, and on the role and functioning of the Court.

4.12. All States have compelling interests in the orderly administration and finality of their criminal justice systems, particularly with respect to heinous crimes of the type committed by Mr. Breard. All States have compelling interests in avoiding external judicial intervention that would interfere with the execution of a sentence that has been affirmed following an orderly judicial process meeting all relevant human rights standards.

4.13. We submit that the Court should not take a step having such potentially far-reaching consequences on the basis of a few days of hurried consideration of a suit filed at the very last moment. Before taking any action to intrude into the criminal process of a State, the Court should require Paraguay to show that it does indeed have a basis for its claim in accordance with the normal, orderly process of full proceedings under Part III of the Rules of Court. In this connection, the Court should go through the process called for by Article 63 of the Statute of the Court, which calls for notification of all States parties to the Vienna Convention so as to afford them the possibility of intervention or other submission of views to protect their own vital interests in the interpretation and application of the Convention.

4.14. Given these compelling reasons for refraining from the provisional measures sought, has Paraguay identified any basis for justifying such an extraordinary remedy? We maintain that this is not the case, since Paraguay has shown nothing to indicate that consular notification would have changed the result of the Breard case.

4.15. Neither Mr. Breard's guilt nor the heinous nature of his crime is at issue; he freely confessed in open court that he had committed the offence. In any case, his guilt was thoroughly established by compelling material evidence. Paraguay has not taken issue with this in its Application or in its argument this morning. There is no question of the execution of an innocent man.

4.16. Nor is there any evidence that Mr. Breard was prejudiced in any way by the apparent lack of consular notification. He had lived in the United States for six years and spoke English well. He understood the proceedings being conducted and participated actively in his own defence. He had full contact with his family and with persons in Paraguay. He had competent counsel well versed in the criminal law of Virginia. He was directly and strongly advised by his attorneys to refrain from the incriminating testimony which he insisted on giving. His conviction was reviewed and upheld by appellate courts of the United States and Virginia.

4.17. Paraguay's contention that the involvement of Paraguayan consular officials would have changed all this is nothing more than imaginative, but wholly unsubstantiated, and implausible speculation. The Court should not engage in an unprecedented intervention in the domestic criminal

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proceedings of a State on the basis of such implausible speculation. What a domestic appellate court would not do, this Court *a fortiori* should not do. This Court should not serve as a supreme court of criminal appeals in derogation of the normal operation of domestic criminal courts.

4.18. On the other hand, we fully recognize that Paraguay has a legitimate interest in ensuring that the provisions of the Vienna Convention are properly observed and that there is not arecurrence of the apparent failure of consular notification in the Breard case. Therefore, as Ms Brown described, the United States has taken extensive measures to ensure future compliance by State and local authorities.

4.19. Further, when Paraguay requested bilateral consultations under the Convention, the United States promptly agreed to consultations on all issues raised by the Breard case. We were specifically ready to discuss the possible procedural steps provided for in Articles II and III of the Protocol concerning conciliation and arbitration. However, Paraguay insisted on an immediate stay of execution as a precondition to refraining from immediate recourse to this Court, which the United States was not in a position to grant. The United States nonetheless remains prepared to engage in bilateral consultations aimed at encouraging more effective implementation of this Convention by both Parties.

4.20. Mr. President, for all these reasons, we believe that the granting of provisional measures sought by Paraguay would have serious negative consequences for the Parties to the Vienna Convention, for the Court, and for the international community as a whole. We urge the Court not to take such a step, and certainly not after only a few days to consider the implications of such an action. We therefore encourage and urge the Court to exercise its power to deny the measures requested by Paraguay.

4.21. Once again, I thank the Court for its attention and consideration of these arguments. I now suggest that the Court recognize the Agent of the United States, Mr. Andrews, to conclude the argument of the United States and to present its Final Submission. Thank you Sir.

The VICE-PRESIDENT: Thank you Mr. Matheson. I call on Mr. Andrews, Agent of the United States.

Mr. ANDREWS:

5.1. Mr. President, this morning the Court asked the Government of Paraguay to provide copies of two letters, one dated 10 December 1996 and one dated 3 June 1997. We would be pleased to provide the unanswered 7 July 1997 letter that the State Department sent to the Government of Paraguay, which was referenced by Ms Brown in her presentation. Mr. President and Members of the Court, this concludes the presentation of the United States. The submission of the United States is as follows: "That the Court reject the request of the Government of Paraguay for the indication of provisional measures of protection, and not to indicate any such measures".

5.2. We thank the Court for its kind attention to our presentations and its consideration of our arguments.

The VICE-PRESIDENT: Thank you Mr. Andrews. Both Parties have now concluded the first round of their oral pleadings. The Court will adjourn now and resume at 3.00 p.m. to afford both Parties an opportunity to reflect. The Court stands adjourned until 3.00 p.m.

The Court rose at 12.50 p.m.

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pleading of Paraguay and we will have a short adjournment to enable the United States to make its submissions.

The Court adjourned from 3.50 to 4.20 p.m.

The VICE-PRESIDENT: Please be seated. We meet now to hear the second round of oral submissions of the United States, and I give the floor to Mr. Andrews, Legal Adviser to the United States Department of State.

Mr. ANDREWS: Mr. President, I would like to call to the podium Mr. John Crook to respond on behalf of the United States.

The VICE-PRESIDENT: Mr. Crook, please.

Mr. CROOK: Thank you Mr. President. Members of the Court.

In our final presentation this afternoon we will make, I believe, six points, attempting to bring together and respond to a number of the considerations that distinguished counsel for Paraguay introduced in his rebuttal. I shall try not to be too long.

My first point is this, that it seems to me that throughout this case, and certainly in the rebuttal we have just heard from Paraguay, there has been a signal of voidance of the burden of proof that the Applicant here must bear. They have in fact proved very little, if anything. Now Mr. Donovan in his presentation this afternoon tried to make up some of the deficiencies by seeking to build upon the evidence and argumentation that we gave you this morning. As to his arguments, I would simply invite the Court to consider the sources and determine in its own mind whether our reading of them, or Mr Donovan's reading of them, is the better. But it does seem to me that it is an anomalous position; a peculiar situation where the burden of the Applicant's proof is that the Respondent did not disprove the Applicant's assertions to the satisfaction of the Applicant. I would certainly disagree with that characterisation, but it does seem to me unsound in relation to the burdens that the Applicant here must bear.

There is one key issue here that I think we should take note of and it is an issue to which counsel for Paraguay did not refer, and that is the key issue of whether in fact consular access in this case would have made any difference. Counsel for Paraguay ignored that point in his summation, and it seems to me that it is an important point and is one that cannot be ignored, because all of Paraguay's case here rests on the factual premise, the assumption, the belief, that things would have been different had a Paraguayan consul been involved. For all the reasons that we suggested, the reasons that Ms Brown suggested, that seems to us to be not the case, that the burden here is on the Applicant, the burden has not been met.

My second basic point Mr. President, is that the Applicant here seems to me have responded to large parts of the United States submission by ignoring them or trivializing them. They ignored Ms Brown's long, and I think very informative description, of the realities of consular practice. Paraguay had nothing to say about that this afternoon. In large measure they ignored the indications that we brought to you regarding the realities of how States interpret and imply their obligations under the Vienna Convention on Consular Relations. They ignored altogether the circumstances of Mr.

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Breard's trial, defences for which he was charged, the adequacy of his counsel, the extensive nature of the appellate remedies that he pursued. They ignored large parts of the United States submission.

My third major point, Mr. President, is that it seems to me that the presentation here by distinguished counsel for Paraguay showed an undue preoccupation with the domestic litigation in the United States in which matters similar to these are being addressed. Counsel for Paraguay indicated that in his view, those cases were not relevant. We would agree, and we therefore will not seek here to re-argue them. I do wish here though to respond particularly to the cases that were raised at the last minute, and that were the occasion of the question from President Schwebel. The Applicant will presumably make those available to the Court, and the Court can inspect them and come to its own judgment regarding their implications. Our recollection is that the cases that the Court has requested were immigration cases involving deportation orders, and not criminal cases. That is our recollection, and we suffer from not having the text with us, but it is our belief that they turned not on the Vienna Convention on Consular Relations obligations as such, but on the fact that the immigration service had failed to follow its own regulations, calling for consular notification. Under federal law, federal agencies are required to follow their regulations, and that was the basis for the courts' decision on those cases. That is our recollection, if we have mischaracterized them, the Court will soon have the opinions and will be able to see, but that is our understanding of what was involved in those cases.

My fourth point is that it seems to me that the Applicants in this case have ignored — have dealt with significant parts of the United States presentation this morning by ignoring it — or in any case by trivializing the implications. We spent a good deal of time here going through the implications of the course of action that is advocated by Paraguay, for example, for other governments, the other parties to the Vienna Convention on Consular Relations.

Counsel for Paraguay responded to that essentially by trivializing the point, saying we have one case and one case only here, and that's all the Court need concern itself about. With respect, Mr. President, that seems to me not to be good enough. With respect to the concerns of the United States, again, counsel for Paraguay minimized or trivialized the consequences of the remedy that they seek here, but again I think in all fairness, that is not good enough. The United States has significant interest in the orderly and authoritative administration of its criminal law, certainly in a case where the murder took place in 1992, the trial took place in 1993, and there appears to be no guilt, no dispute between the parties as to the guilt of the accused.

I think the same observation holds true as well concerning our points regarding the implications of the remedy sought by Paraguay for the Court. The concern is a real one, the implications for other countries and other situations are real, they cannot be ignored. That brings me closer to my final points, Mr. President.

The fifth point is the rather basic question. Is there a remedy? And the associated question, is there jurisdiction here? For the reasons that I indicated, it seems to me that the Court must consider the likelihood of Paraguay being able to show that the remedy that underlies their whole case exists and is available to them within the four corners of the Vienna Convention on Consular Relations. It is not appropriate for me here to re-argue the points I made this morning but I simply invite the Court to consider them. The point that there is no support in the text, the point that there is no support in the history, the point that there is no support in practice. I think it is a fair gloss on that, that Paraguay is quite unlikely to be able to show that the remedy it seeks either is available, or in any case, is to be found within the sphere of the Vienna Convention on Consular Relations which of course is the requirement for there to be jurisdiction. We are at something of a disadvantage because Paraguay, as the Applicant, has never really made the case. We have sought to respond, Paraguay has then tried to make its case by dealing with our response and we are left in this very unsatisfactory situation, Mr. President, that the basic burden of the Applicant has not been met. I think I would agree here with distinguished counsel for Paraguay who, in his presentation this afternoon, used words to the effect — and I freely admit that this is a paraphrase and not a quote; I hope this is a fair paraphrase — that

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to find the remedy, you must go beyond the text of the treaty, that is the problem, Mr. President, there is no jurisdiction. The Applicants seem unlikely to prevail on the merits.

Let me turn to my sixth and final point, Mr. President, and that is the reference to the *Hostages* case. Now, there was I think perhaps a misunderstanding of our position and I want to deal with it, because I think it is important. It is not our contention here that the Court is divested of jurisdiction by reason of the fact that we have confessed error and admitted that Mr. Breard was not given consular notification, that is not our point at all. Our point is the much broader one, that I have just discussed, that the remedy that is sought here is a remedy that goes far beyond the scope of the Vienna Convention and far beyond the scope of the jurisdiction of the Court.

Let me respond to other points regarding the *Hostages* case. It does seem to me that it is — unseemly is perhaps too strong a word — but it is not quite right to draw upon the *Hostages* case as the precedent for action by this Court here. The *Hostages* case involved a much more aggravated situation, the continued detention of a large number of hostages in conditions of apparent danger, in violation of fundamental rules for the protection of diplomats and consuls. It was a profound, potentially very dangerous, disruption of international relations and it seems to me that it perhaps trivializes that case to analogize it to a situation where the Applicant is seeking not to deal with matters of great consequence at stake in the *Hostages* case, but rather to disrupt the operations of the criminal courts of a party to the Statute of this Court. It seems to me the analogy is not appropriate and it is not one that should illuminate the deliberations of this Court. Mr. President, I apologize that these remarks have been somewhat disjointed, the circumstances are a bit difficult, but I hope they have been of some use in clarifying our position. As always my delegation appreciates the courtesy of the Court in listening to our presentation. You have heard already the submission of the United States Agent and it is only for me to thank the Court.

The VICE-PRESIDENT: Thank you Mr. Crook. This brings us to the end of these oral hearings. I would like to express on behalf of the Court its warm thanks to the Agents, counsel and advocates of the Parties for the quality of their arguments and the courtesy and co-operation they have shown. In accordance with the usual practice, may I ask the Agents to remain at the disposal of the Court for any further information which it might need and, subject to that, I now declare closed the oral hearings on the request for the indication of provisional measures in the case concerning the *Application of the Vienna Convention on Consular Relations (Paraguay v. the United States)*. The Court will now withdraw to deliberate. The Order containing the decision of the Court will be read at a public sitting to be held on Thursday 9 April. There being no other matters before it today, the Court will now rise.

The Court rose at 4.35 p.m.

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(10)
97-1390

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,

v. Docket Nos. CR92-1467, 1664-1668

ANGEL BREARD,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

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The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Paul F. Sheridan
Judge

FILED: March 31, 1998

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770
(CA-96-745-R)

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; JOSE ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs - Appellants,

versus

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia; RICHARD CULLEN, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia; SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Facility, Boydton, Virginia; PAUL F. SHERIDAN, Judge for the Circuit Court of Arlington County, Virginia; BENJAMIN N.A. KENDRICK, Judge for the Circuit Court of Arlington County; WILLIAM NEWMAN, JR., Judge for the Circuit Court of Arlington County; WILLIAM L. WINSTON, Honorable, Judge for the Circuit Court of Arlington County; RICHARD E. TRODDEN, Commonwealth's Attorney for the County of Arlington; EDWARD A. FLYNN, Chief of Police of Arlington County,

Defendants - Appellees.

UNION INTERNATIONALE DES AVOCATS; UNITED STATES OF AMERICA; FREDERICK M. ABBOTT; DAVID J. BEDERMAN; RICHARD B. BILDER; DAVID D. CARON; ANTHONY D'AMATO; LORI FISLER DAMROSCH; WILLIAM DODGE; MARTHA A. FIELD; JOAN M.

Ex 2

FITZPATRICK; EGON GUTTMAN; LOUIS HENKIN; HAROLD HONGJU KOH; BURT LOCKWOOD; STEFAN A. RIESENFELD; OSCAR SCHACHTER; HERMAN SCHWARTZ; ANNE-MARIE SLAUGHTER; RALPH GUSTAV STEINHARDT; DAVID WEISSBRODT,

Amici Curiae.

ORDER

Appellants have filed an application for stay of or injunction against the execution of Angel Breard, the appellant in case No. 96-25, Breard v. Pruett, pending disposition by the United States Supreme Court of their petition for writ of certiorari. Appellees filed a response in opposition to the application.

The Court denies appellants' application for stay of or injunction against execution.

Entered at the direction of Senior Judge Phillips with the concurrence of Judge Widener and Judge Murnaghan.

For the Court

/s/ Patricia S. Connor
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY, et al.,

Appellants

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, et al.,

Appellees

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO STAY ANGEL BREARD'S EXECUTION

If there ever were any doubt that Paraguay's federal lawsuit always has been nothing more than a thinly-veiled attempt to thwart Angel Breard's death sentence, Paraguay's present motion to stay Breard's execution certainly removed it. This Court should deny the motion for the following reasons:

1. On January 22, 1998, this Court affirmed the district court's dismissal of Paraguay's lawsuit for lack of jurisdiction. Paraguay v. Allen, 134 F.3d 622 (4th Cir. 1998). Paraguay did not seek rehearing in banc or ask this Court to stay its mandate. The mandate issued on February 13, 1998.

Ex 3

2. On February 24, 1998, Paraguay filed a petition for a writ of certiorari in the Supreme Court.[1] On February 25, 1998, the state trial court scheduled Angel Breard's execution for April 14, 1998. Paraguay could have filed its stay request in this Court at any time after February 25 when the state trial court scheduled Breard's execution for April 14. Instead, Paraguay waited a full month and did not file its stay request until March 24.

3. Whether Breard is entitled to a stay of execution is an issue that this Court undoubtedly will address in the context of the stay motion he now has pending in this Court. The answer to that question, however, must depend on the merits of ***Breard's*** case, ***not Paraguay's*** civil suit. Paraguay and its officials clearly have no standing to seek or obtain a stay of Bread's execution. Under 28 U.S.C. § 2101(f), this Court has the authority to stay a "judgment or decree" that is subject to review by petition for certiorari. But, while Paraguay and its officials certainly were parties to this Court's judgment in Paraguay's civil case, staying the judgment in that case cannot possibly operate to stay Breard's execution. And, indeed, Paraguay has not asked this Court to stay its judgment in the civil case.

4. What Paraguay has done instead is to ask this Court to stay Breard's April 14 execution date. Paraguay and its officials, however, are not, and never have been, parties to the case that resulted in the presumptively valid state court criminal judgment against Breard that they now seek to stay. This Court's sole authority to stay Breard's execution is pursuant to 28

[1] Breard filed his certiorari petition on March 11, 1998. The Commonwealth filed its brief in opposition on March 19. Breard filed his stay motion in this Court on March 23, and the Commonwealth filed its opposition on March 24. This Court has not yet acted upon the motion. There is absolutely no question that the Supreme Court can and will dispose of Breard's certiorari petition, as well as his inevitable stay request, prior to the scheduled time of execution.

U.S.C. § 2251,[2] and Paraguay clearly has no standing under that statute to seek such a stay because neither it nor its officials are a party to Breard's ongoing § 2254 proceeding.

5. In Breard's federal habeas case, both this Court and the district court correctly have ruled that his "Vienna Convention" claim is barred by his procedural default in failing ever to have raised the claim in state court. See Breard v. Pruett, 134 F.3d 615, 619-620 (4th Cir. 1998), affirming, Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996); see generally Gray v. Netherland, 116 S.Ct. 2074, 2080-2081 (1996) (claims never raised in state court are barred from federal habeas review).[3] It thus is obvious that Paraguay is attempting to obtain a stay of execution for Breard because his underlying habeas claim is barred and, as a matter of law, cannot support the granting of a stay. This Court clearly cannot permit Paraguay to obtain for Breard what he cannot obtain in his own right.

6. In Gomez v. United States District Court, 503 U.S. 653 (1992), the Supreme Court made clear that a suit under 42 U.S.C. § 1983 cannot be employed to obtain a stay of execution that would be precluded under the rules governing successive federal habeas petitions. See Lonchar v. Thomas, 116 S.Ct. 1293, 1301 (1996) (interpreting Gomez to mean that the habeas rules "would apply, even if § 1983 [was] also a proper vehicle [for the] claim"); Felker v. Turpin, 101 F.3d 95, 96 (11th Cir.) ("Gomez held that a plaintiff cannot escape the rules regarding

[2] "A justice or judge of the United States before whom a habeas corpus proceeding is pending, may...stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding." 28 U.S.C. § 2251.

[3] Even if Breard's "Vienna Convention" claim were not procedurally defaulted, a federal habeas court could not grant relief upon such a claim without violating the "new rule" doctrine. See generally Caspari v. Bohlen, 510 U.S. 383, 390 (1994). No court ever has held that an alleged violation of the Vienna Convention may serve as a basis for overturning a State prisoner's conviction or sentence. If such a rule ever is created, it must be announced on direct appeal, not federal collateral review.

second or successive habeas petitions by simply filing a § 1983 claim"), cert. denied, 117 S.Ct. 451 (1996). Regardless of whether such a § 1983 suit is filed by the prisoner himself or by a third party, ***if the object of the suit is to obtain for the prisoner relief from his conviction or sentence to which he would not be entitled in a federal habeas proceeding, Gomez dictates that the attempted circumvention must fail.***

7. On numerous occasions during just the last year, the Supreme Court has denied stays of execution premised upon ongoing § 1983 litigation designed to evade the rules governing federal habeas review under § 2254. See, e.g., Buchanan v. Gilmore, 118 S.Ct. ____, 1998 U.S. LEXIS 1782 (Mar. 18, 1998); Tucker v. Texas, 118 S.Ct. 906 (1998); In re Mu'Min, 118 S.Ct. 438 (1997) (in addition to denying stay, Court also denied "petition for writ to preserve [§ 1983] jurisdiction"); Perry v. Norris, 118 S.Ct. 15 (1997); O'Dell v. Allen, 118 S.Ct. 2 (1997) (denial of injunction); In re O'Dell, 118 S.Ct. 2 (1997) (denial of stay); McQueen v. Sapp, 117 S.Ct. 2536 (1997); Woratzeck v. Arizona Board of Clemency, 117 S.Ct. 2500 (1997). See also Griffin v. Missouri, 515 U.S. 1153 (1995); Poyner v. Murray, 507 U.S. 981 (1993).[4]

8. Even if Paraguay could speak for Breard - and it cannot - it clearly would not be entitled to a stay of Breard's execution under the stringent rules governing federal habeas proceedings. Gomez and its progeny require that this Court deny Paraguay's attempt to circumvent those rules by requesting a stay of Breard's execution, an extraordinary form of federal collateral relief to which neither Breard nor Paraguay is entitled. Indeed, just last week a panel of this Court vacated a stay of execution improvidently granted by a district court on the

[4] In Poyner, the Supreme Court denied a stay of execution and the prisoner was executed as scheduled on March 18, 1993. Significantly, the Court did not dispose of the certiorari petition in the § 1983 proceeding upon which the stay request had been premised until two months later. See Poyner v. Murray, 508 U.S. 931 (1993).

basis of a § 1983 suit filed by a death row prisoner. See Buchanan v. Gilmore, ___ F.3d ___, 1998 U.S. App. LEXIS 5058 (4th Cir., Mar. 18, 1998) (Judges Ervin, Hall and Butzner). The Supreme Court subsequently denied the prisoner's stay request and he was executed as scheduled. See Buchanan, 1998 U.S. LEXIS 1782. Obviously, if a State prisoner himself cannot obtain a stay of execution on the basis of a § 1983 suit he has filed, a third-party § 1983 suit such as Paraguay's cannot support such a stay.

9. Moreover, even if Paraguay could overcome all of the foregoing obstacles to the granting of a stay, this Court still should deny Paraguay's request to stay Breard's execution. Under Barefoot v. Estelle, 463 U.S. 880, 895 (1983), this Court may not stay a State prisoner's execution unless there is a reasonable probability that four Justices would vote to grant certiorari ***in his case***, and there is a significant possibility the Court would reverse the decision of the court of appeals. See Netherland v. Tuggle, 116 S.Ct. 4, 5 (1995). Paraguay cannot possibly meet this stringent standard.

10. First of all, Paraguay filed its certiorari petition in the Supreme Court more than a month ago. Thus, even if the impropriety of a third-party request to stay Breard's execution were dropped from the equation, it is self-evident that the Supreme Court is far better situated than this Court to determine whether it needs more time to consider a certiorari petition that was filed weeks ago.

11. Moreover, as demonstrated in the Warden's opposition to Breard's stay request (Attachment), there is ***no*** likelihood the Supreme Court will grant Breard's certiorari petition or reverse this Court's decision denying him federal habeas relief. But, even if the granting of a stay of Breard's execution could be made to turn on the likelihood the Court will grant ***Paraguay's*** certiorari petition, the result would be the same. The specific issue raised in Paraguay's certiorari

petition is whether the federal courts have jurisdiction to entertain a civil suit brought by a foreign country and its officials against the officials of a State, ***where the sole object of the suit is the invalidation of a state prisoner's criminal conviction and sentence***. On that issue, the only two federal appeals courts that have considered the matter have concurred that the question must be answered in the negative. See Paraguay, 134 F.3d at 627-629; United Mexican States v. Woods, 126 F.3d 1220, 1222-1224 (9th Cir. 1997). The Supreme Court, of course, grants certiorari "only for compelling reasons." U.S.Sup.Ct. Rule 10. Primary among such "compelling reasons" is the existence of a "conflict" between the decision of a court of appeals in the case where review is being sought and "the decision of another...court of appeals on the same important matter." Rule 10(a). Given the lack of conflict among the courts of appeals, there is no reasonable probability that the Supreme Court will grant certiorari in Paraguay's case. Paraguay's pending certiorari petition, therefore, could not furnish the basis for a stay of Breard's execution even if Paraguay could overcome its clear lack of standing to request such relief.

12. There also is no significant possibility that the Supreme Court would reverse this Court's decision. The Eleventh Amendment clearly does not permit a foreign nation to sue a State in federal court. See Principality of Monaco v. Mississippi, 292 U.S. 318 (1934). A suit, the primary purpose of which is the setting aside of a State prisoner's criminal conviction or sentence is, in reality, a suit against the State, see Idaho v. Coeur d'Alene Tribe, 117 S.Ct. 2028, 2034 (1997) (Eleventh Amendment bars suit against state officials when State is the real, substantial party in interest), and the State's interests are at their apex when the validity of its criminal judgments are challenged collaterally in federal court. See generally McCleskey v. Zant, 499 U.S. 467, 491-492 (1991). Moreover, the statutory habeas corpus remedy embodied in § 2254 proceedings is "well established" as the ***sole*** relevant exception to the State's Eleventh Amendment immunity. See

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1182 (1996) (Souter, J., dissenting); Paraguay, 134 F.3d at 627-628 n.6. Therefore, outside the limited context of federal collateral proceedings initiated by a State prisoner, the federal courts have no jurisdiction to entertain a suit, like Paraguay's, where the *sine qua non* is the overturning of the prisoner's capital murder conviction and death sentence. See Paraguay, 134 F.3d at 627-629; Woods, 126 F.3d at 1222-1224.

13. Even if this Court were wrong about the Eleventh Amendment, there ***still*** would be no significant possibility of reversal in this case. As the district court found, see Paraguay, 949 F. Supp. at 1273, the lower federal courts simply have no jurisdiction to conduct what is, in effect, a direct review of the State court criminal judgment against Breard. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-416 (1923). Moreover, as both the Commonwealth ***and the United States*** argued in this Court,[5] the issues raised by Paraguay about alleged treaty violations and the remedies therefor, are essentially non-justiciable "political questions" which are beyond the jurisdiction of the federal courts. See generally Baker v. Carr, 369 U.S. 186, 211 (1962); see also Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations...[but] with all this the judicial courts have nothing to

[5] The United States filed an amicus brief in this Court supporting the Commonwealth's position that the federal courts lack jurisdiction to entertain Paraguay's suit. The United States also presented its position during oral argument on June 4, 1997. Finally, the United States communicated its position to Paraguay in a letter from the Department of State to the Ambassador of Paraguay dated July 7, 1997. (Attachment 2). This Court, therefore, should not be misled by Paraguay's suggestion that this Court's decision "is inconsistent with" the position of the United States. (Paraguay's Stay Memorandum at 8).

do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department"). Because there is no significant possibility that the Supreme Court would reverse this Court's conclusion that the federal courts lack jurisdiction to entertain Paraguay's suit, the pending certiorari petition cannot conceivably serve as the basis for a stay of Breard's execution.[6]

CONCLUSION

Paraguay's motion for a stay of Angel Breard's execution should be denied.

Respectfully submitted,

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[6] Under Barefoot, in addition to the "substantial probability" and "significant possibility" requirements, the party seeking a stay of execution also must demonstrate a "likelihood of irreparable harm." See Barefoot, 463 U.S. at 895. When the movant is a death row prisoner himself, this requirement usually is deemed satisfied. Paraguay, however, simply cannot demonstrate any likelihood of "irreparable harm" to itself or to its officials if Breard is executed while its certiorari petition remains pending, ***especially if Breard himself has asked for and been denied a stay***.

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CERTIFICATE OF SERVICE

On March 25, 1998, a copy of this Opposition was mailed and faxed to Donald F. Donovan, Debevoise & Plimpton, 875 Third Avenue, New York, NY 10022, counsel for appellants.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANGEL FRANCISCO BREARD,

Appellant

v. **No. 96-25**

FRED W. GREENE, WARDEN,

Appellee

WARDEN'S OPPOSITION TO
MOTION FOR STAY OF EXECUTION

The Warden, by counsel, opposes Angel Breard's motion for a stay of execution:

1. In a published opinion dated January 22, 1998, this Court affirmed the denial of federal habeas corpus relief in Breard's case. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). The Court denied Breard's petition for rehearing on February 18, 1998.

2. On February 25, 1998, pursuant to Virginia Code § 53.1-253.1, the state trial court scheduled Breard's execution for April 14, 1998. On February 26, 1998, this Court issued its mandate.[1]

3. Breard now asks this Court to issue a stay of execution so that the Supreme Court will have adequate time to consider a petition for a writ of certiorari which he filed on March 11, 1998. Well-settled principles require that this request be denied.

[1] Technically, this Court has no jurisdiction to issue a stay of execution because the mandate already has issued. Breard also has requested that this Court recall the mandate. Both the stay motion and the request to recall the mandate should be denied.

ATTACHMENT 1

4. Both the Supreme Court and this Court have made clear that a prisoner under sentence of death is not automatically entitled to a stay of execution for purposes of filing a petition for a writ of certiorari. See Netherland v. Tuggle, 116 S.Ct. 4, 5 (1995); Autry v. Estelle, 464 U.S. 1, 2-3 (1983); Beaver v. Netherland, 101 F.3d 997 (4th Cir. 1996). Quite clearly, moreover, the Supreme Court is in the best position to determine whether a stay of execution is necessary for it to have sufficient time to rule upon the petition Breard already has filed. Indeed, the Supreme Court has not hesitated to grant a stay when necessary or to deny a stay when unnecessary. See, e.g., Buchanan v. Angelone, 117 S. Ct. 1423 (1997) (stay granted); Mu'Min v. Pruett, 118 S.Ct. 438 (1997) (stay denied). As this Court is well aware, the three full weeks remaining before Breard's April 14 execution date is more than enough time for the Supreme Court to dispose of the certiorari petition that Breard filed two weeks ago.[2]

5. In any event, Breard must satisfy the test established in Barefoot v. Estelle, 463 U.S. 880 (1983), in order for this Court to stay his execution. Specifically, Breard is entitled to a stay only if he can establish that there is "a reasonable probability that four members of the [Supreme] Court would consider the underlying issues sufficiently meritorious for the grant of certiorari" ***and*** that there is "a significant possibility of reversal of [this] Court's decision [by the Supreme Court]" if certiorari were granted. See Tuggle, 116 S. Ct. at 5. Breard clearly has not satisfied these demanding requirements.

6. In his certiorari petition, Breard has raised his so-called "Vienna Convention" claim. This Court correctly ruled that the claim is procedurally barred because it is undisputed that Breard never raised the claim in state court and because he had failed to show the required "cause" for the

[2] The respondent filed his brief in opposition to Breard's petition on March 19.

default. Breard, 134 F.3d at 619-620. It thus would be difficult to imagine a claim with *less* chance of the Supreme Court's granting certiorari and reversing this Court's decision.

7. The recent actions of the Supreme Court in cases from Virginia and Texas demonstrate that there is no substantial likelihood the Court will grant certiorari to review defaulted "Vienna Convention" claims such as Breard's. In September of 1997, the Supreme Court denied Mario Murphy's certiorari petition and request for a stay of execution in a case where this Court had ruled, just as it has in Breard's case, that a "Vienna Convention" claim never raised in state court is barred from federal habeas review. See Murphy v. Netherland, 116 F.3d 97 (4th Cir.), stay and cert. denied, 118 S.Ct. 26 (1997). Murphy was executed as scheduled on September 17, 1997. Similarly, in June of 1997, the Supreme Court denied a stay request and a petition for a writ of habeas corpus in a capital case from Texas where the prisoner was raising a defaulted "Vienna Convention" claim. See In Re Irineo Tristan Montoya, 117 S.Ct. 2476 (1997). Montoya was executed as scheduled on June 18, 1997.[3]

8. Breard also has raised his "proportionality review" claim in his certiorari petition. This Court correctly ruled that the claim is defaulted because it was raised on direct appeal solely as a matter of state law and because, when it first was raised as a federal "due process" claim during the state habeas proceedings, the Virginia Supreme Court expressly applied its procedural default rule. See Breard, 134 F.3d at 621.[4]

[3] In both Murphy and Montoya, the prisoners' petitions filed in the Supreme Court squarely raised the alleged "Vienna Convention" violations. (See Attachments A and B). Indeed, the "Questions Presented" in Murphy's certiorari petition are virtually identical to Breard's. (Attachment A).

[4] Even if the claim were not defaulted, moreover, it fails to raise a cognizable federal issue. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (errors of state law not cognizable); George v. Angelone, 100 F.3d 353, 360 (4th Cir. 1996) (Virginia Supreme Court is final arbiter of scope of state appellate review), cert. denied, 117 S.Ct. 854 (1997).

9. As a matter of law, claims that are barred from federal collateral review by established principles of procedural default cannot provide a basis for the granting of a stay under the Barefoot standard. See Bowersox v. Williams, 116 S.Ct. 1312 (1996); Delo v. Stokes, 495 U.S. 320 (1990); see also McCleskey v. Zant, 499 U.S. 467, 490 (1991) (equating principles of procedural default and abuse of writ). There is no reasonable probability that the Supreme Court will grant certiorari to review this Court's fact-specific application of the procedural default doctrine or its determination that Breard has not shown "cause" for his defaults.

10. For the foregoing reasons, this Court should deny Breard's motion for a stay of execution.

Respectfully submitted,

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On March 24, 1998, a copy of the foregoing Opposition was mailed and faxed to Alexander Slaughter, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030, counsel for appellant.

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United States Department of State

Washington, D.C. 20520

JUL - 7 1997

Dear Ambassador Prieto:

I am responding on behalf of the Department of State to your letter to Ambassador Davidow of June 3, 1997, concerning the matter of Mr. Angel Breard. Your letter was received at the same time that my letter to you of the same date concerning this case was delivered to your representatives. Your letter reiterates your government's earlier request that the United States intercede on behalf of Mr. Breard. It also again expresses the view that the courts of the United States have authority to remedy any violation of the obligation of consular notification that occurred with respect to his detention and discusses the alternative possibility of these matters being considered by the International Court of Justice.

We have previously assured your government that the United States places the highest value on ensuring respect for the consular notification obligation under Article 36 of the Vienna Convention on Consular Relations ("VCCR"). We deeply regret if such notification was not provided to Mr. Breard. After learning that Mr. Breard may not have been advised of his right to consular assistance, the Department reminded officials of the State of Virginia of the need to advise all alien detainees of this right. We have now had extensive discussions with such officials about how consular notification and access should be implemented.

Since receiving your June 3 letter, the Department has also reviewed in more detail the facts of Mr. Breard's case, with a particular focus on the consular notification issues raised by your government and the claim that a consular officer could have dissuaded Mr. Breard from believing that that he should confess in open court to the February 17, 1992, murder of Ruth Dickie and claim to have been under a "Satanic curse" imposed by his father-in-law. Attached for your information is a summary of the facts as we understand them. (If there is additional information that you believe we have not considered, we would be pleased to receive it.)

Our review has been informed by our understanding of the consular notification obligation. A primary purpose of consular notification is to permit a state to offer its nationals in a foreign country the benefit of consular services and protection. The actual extent of consular assistance will depend on the country concerned, its consular practices, and its resources in the host country. Under no circumstances, however, can a consular officer in the United States act as an attorney for an alien. Moreover, when an alien is arrested, he is subject to the laws of the host state, and consular protection cannot immunize him from those laws, the judicial system established to enforce them, or the penalties imposed for their violation. A consular officer instead generally seeks to ensure that the alien has appropriate legal representation and that his legal rights are respected. The consular officer may also attend to the alien's needs while imprisoned, and may communicate with the alien's family and friends, if necessary. The actual need for and provision of consular services will generally be less in

The Honorable
Jorge G. Prieto,
Ambassador of Paraguay,
Washington.

ATTACHMENT 2

situations where an alien is well represented by attorneys and in direct touch with family and friends – a situation most likely when the alien has been residing in the host country for a significant period. In some cases, an alien may decline consular notification, for privacy or other reasons, or because the alien does not consider consular assistance to be necessary.

While the obligation of consular notification is a serious one, in every country there are times when it is overlooked. U.S. diplomatic and consular officers raise issues of lack of consular notification with respect to U.S. nationals abroad, just as other countries' representatives raise similar concerns with the Department of State about aliens in the United States. Consular notification and access is a matter of continuous discussion between governments, which in our experience regularly review and if necessary enhance their efforts at compliance. Neither the VCCR text nor its negotiating record addresses how a failure to comply with the consular notification obligation must be remedied. We are aware of no state party to the VCCR that has a procedure for setting aside the results of its judicial process when there has been a failure to provide consular notification.

Having reviewed the facts in light of these considerations, we cannot accept that the lack of consular notification provides a basis for undoing Mr. Breard's conviction and sentence. It is entirely speculative, in any event, that a Paraguayan consul would have been intimately involved in Mr. Breard's trial and defense and would have convinced Mr. Breard to accept a plea bargain. Mr. Breard's attorneys were well positioned to advise him of the likely consequences of his confession in the State of Virginia, yet he would not accept their advice or the apparent advice of his mother to plead guilty. It is difficult to believe that a consular officer could have proven more persuasive.

Our review of these issues has reinforced our view that lawsuits between governments are not the appropriate means to enforce the consular notification obligation. We agree in particular with your assessment that this case is not one appropriate for resolution by the International Court of Justice. The reference to the VCCR Optional Protocol in our amicus brief was simply to illustrate that the state parties to the VCCR contemplated that issues under the VCCR would be addressed on a government-to-government basis, and certainly not by a government resorting to the domestic courts of another state party. We regret if that reference created any misunderstanding on this point. In any event, however, an ICJ proceeding is both costly and takes many years and extensive resources to pursue. It seems particularly inappropriate when there is no genuine dispute as to the requirements of consular notification and when the suggestion that consular notification in a particular case would have led to a different result is so speculative and implausible. Moreover, the ICJ would not have jurisdiction over Paraguay's asserted claims under the 1859 Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, which is not relevant to these issues in any event.

In closing, I reiterate that the Department of State remains available to consider other relevant information, including information about Mr. Breard's case and about consular notification practice by Paraguay and other countries. In addition, we would welcome the opportunity to discuss with Paraguayan consular officers the general question of consular notification and access and how our respective countries can improve implementation of this obligation.

Sincerely,

James H. Thessin
Deputy Legal Adviser

FACTS CONCERNING ANGEL BREARD

Mr. Breard is a dual Paraguayan-Argentinian national who came to the United States in 1986, originally as a student. He had been in the United States for roughly six years at the time he was arrested for Ruth Dickie's murder. He studied English when he first arrived here, and his command of English was sufficiently good that he acted as an interpreter in prison and did not require the assistance of an interpreter at trial. His trial attorneys have stated that they had no difficulty in communicating with him.

The State of Virginia cannot document that consular notification was given, but it is clear that Mr. Breard's family was quickly notified of his arrest and that others in Paraguay were also contacted. When he was first arrested, Mr. Breard asserted his right to an attorney and called his uncle. His mother testified on his behalf in the sentencing phase. In addition, Mr. Breard's attorneys have said that they were in touch with sources in Paraguay for information that might have assisted with his defense.

Mr. Breard's attorneys have also stated that they and his mother advised him to plead guilty. They have further stated that they advised Mr. Breard that his chances of being sentenced to death, rather than to life imprisonment, would be greater if he insisted on a trial and testified. As far as the courts have determined to date, Mr. Breard's attorneys were competent and he had the full panoply of due process protections guaranteed by the Constitution of the United States. These protections are among the most extensive provided by any state party to the VCCR.

Mr. Breard rejected the advice of his attorneys, refused to pursue a possible plea arrangement, and insisted on testifying at trial and at his sentencing hearing. The court was informed that Mr. Breard was testifying against the advice of counsel. He testified to the facts of the crime and claimed to have acted under a "Satanic curse" imposed by his father-in-law. During the sentencing phase, his testimony led to cross-examination that his trial attorneys have said had a negative effect on the jury.

Independently of Mr. Breard's testimony there was physical evidence that Mr. Breard attempted to rape and then brutally murdered Ruth Dickie on February 17, 1992. Blood, semen, and hair samples and DNA tests all pointed to Mr. Breard as the murderer. There was also evidence of significant aggravating factors to support imposition of the death penalty under Virginia law. The scene of the crime reflected the violence of Ruth Dickie's murder and the attempted rape that preceded it. Mr. Breard had attacked two other women, one before and one after Ruth Dickie's murder. Each attack was violent, and the second involved a sexual assault that was interrupted only because a neighbor called the police, who caught Mr. Breard with his victim. The arrest of Mr. Breard in the course of this assault led to Mr. Breard being charged with Ruth Dickie's murder.

It appears from these facts that Mr. Breard received the assistance that consular notification is designed to ensure. He had two attorneys and was in close touch with his family and others who might have helped him. Mr. Breard was a six-year U.S. resident who asked for an attorney when arrested; he apparently understood at least this basic tenet of the U.S. system reasonably well. In any event, however, he was clearly and repeatedly informed that it would not be to his benefit to plead not guilty and then to confess at trial.

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NUMBER OF PAGES FOLLOWING COVER: 17

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Ex 4

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY; JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States; and JOSÉ ANTONIO DOS SANTOS, Consul General of the Republic of Paraguay to the United States,

Plaintiffs-Appellants,

— against —

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia, *(additional parties listed inside cover)*

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fourth Circuit Local Rule 26.1, plaintiffs-appellants the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José Antonio Dos Santos make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

No.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

No.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b))?

No.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an action for injunctive and declaratory relief to remedy violations of two treaties of the United States and of 42 U.S.C. § 1983. The District Court therefore had original jurisdiction under 28 U.S.C. § 1331. In addition, this is an action in which a foreign state is the plaintiff and citizens of a state are defendants. The District Court therefore also had jurisdiction under 28 U.S.C. § 1332(a)(4). While the United States Supreme Court also had original jurisdiction of this action, *see* U.S. CONST. art. III, § 2, that Court's jurisdiction over this case is not exclusive. 28 U.S.C. § 1251(b)(1).

On November 27, 1996, the District Court entered a final order of dismissal that disposed of all claims of all parties in the action. Plaintiffs-appellants filed their notice of appeal on December 5, 1996. This Court therefore has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court erroneously held that, notwithstanding the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment bars an action seeking prospective injunctive relief against state officials to end the continuing harm the plaintiffs suffer as a result of defendants' failure to afford them their rights under two treaties of the United States, on the ground that the injunction would merely remedy past unlawful conduct, not end a continuing violation of federal law?

2. Whether the District Court erroneously held that, under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), it lacked subject matter jurisdiction over an action seeking vacatur of a foreign national's criminal conviction and sentence brought by the national's sovereign, its ambassador and its consul even though the plaintiffs here had not been parties to the state criminal proceedings and sought to vindicate only their own rights under two treaties of the United States?

STATEMENT OF THE CASE

This is an action by plaintiffs-appellants the Republic of Paraguay, its Ambassador Jorge J. Prieto and its Consul General José Antonio Dos Santos (collectively, "Paraguay") to enforce the rights granted Paraguay and its consular officers under two treaties of the United States, the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (the "Vienna Convention"), and the Treaty of Friendship, Commerce and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091 (the "Friendship Treaty") (together, the "Treaties"). The Treaties provide Paraguay's consular officers with the rights (*1*) to receive prompt notification of the detention of Angel Francisco Breard, a Paraguayan national, and (*2*) to provide consular assistance to Breard during the course of the criminal proceedings against him. No notification was provided, and Paraguay's consular officers were allowed access to Breard only after he was tried, convicted and sentenced to death and had exhausted all appeals and state habeas proceedings. Defendants are Virginia state officials who continue to deny Paraguay its right to provide consular assistance to Breard at a time and in a context where it can be meaningful and effective.

On September 12, 1996, Paraguay filed its complaint in the United States District Court for the Eastern District of Virginia, alleging violations of the two Treaties and, with respect to plaintiff-appellant Dos Santos, violations of 42 U.S.C. § 1983. The complaint sought, among other relief, an injunction barring the defendants from taking any future actions based on Breard's illegally obtained conviction, vacating the conviction and ordering the defendants to afford Paraguay its rights under the Treaties in any further proceedings against Breard. On October 1, 1996, defendants moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. FED. R. CIV. P. 12(b)(1), 12(b)(6).

On November 27, 1996, the District Court (Hon. Richard L. Williams) entered a final order dismissing the action for lack of subject matter jurisdiction. The plaintiffs filed their notice of appeal on December 5, 1996.

STATEMENT OF FACTS

The Treaty Obligations

In 1970, the United States and the Republic of Paraguay entered into the Vienna Convention. In doing so, both nations recognized that each sovereign was bound by the terms of the Convention and that each had the right to have any violation of those terms by the other remedied. A12-13.[1]

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1. Citations in the form "A__" are to the accompanying Joint (continued...)

Under the United States Constitution, the Vienna Convention became part of the "supreme Law of the Land" and binding on each of the United States. A12; U.S. CONST. art. VI.

A key consular function protected by the Vienna Convention is assisting nationals of one nation who are arrested by the law enforcement authorities of the other. A13-14. Law enforcement officials in the United States arresting a Paraguayan national must "without delay" inform the Paraguayan that he has the right to communicate with a Paraguayan consular officer. If the Paraguayan so requests, the law enforcement officials must "without delay" inform the Paraguayan consular officers of the arrest and permit them to communicate with the Paraguayan to render assistance to him in the criminal proceedings. *Id.* The Vienna Convention makes it clear that consular officers must be provided a *meaningful* opportunity to exercise their right of consular communication. Vienna Convention, art. 36(2) (right of consular communication "shall be exercised in conformity" with local laws and regulations, provided that such "laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended").

Over 130 years ago, in 1860, the United States and the Republic of Paraguay entered into the Friendship Treaty. A14-15. Article XII requires that consular officers of Paraguay be accorded "whatever privileges, exemptions, and immunities are or may be" granted by the United States to consular officers

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1.(...continued)
Appendix. Except as otherwise noted, the statement of facts is based on the allegations of the complaint (A6-26).

"of any other nation whatever." The United States subsequently granted to consular officers of other nations, including the United Kingdom and the Russian Federation, the privilege of receiving immediate and mandatory notification of the arrest or detention of one of their nationals by law enforcement authorities in the United States. A15. Under the Friendship Treaty, law enforcement authorities in the United States are therefore required to extend Paraguayan consular officers the same privilege and immediately notify them when a Paraguayan citizen is arrested. *Id.*

Defendants' Continuing
Violation Of Paraguay's Rights

On September 1, 1992, a Paraguayan citizen, Angel Francisco Breard, was arrested by the Arlington County police department on suspicion of murder. A17. Although they were aware that Breard was a Paraguayan national, defendants never informed Breard of his right under the Vienna Convention to consular assistance from Paraguay. Nor did they inform Paraguay that Breard was in their custody. *Id.* Had defendants done so, Breard would have invoked his right to the assistance of his country's consul, and Paraguay would have provided him help in his criminal proceeding that could have changed its outcome, including (*a*) evaluating the desirability of Virginia's plea offer of life imprisonment, (*b*) assessing the advice of Breard's counsel that he not testify at trial and (*c*) presenting material evidence in support of a life sentence at the mitigation phase of Breard's trial. A17-20.

On June 24, 1993, Breard was convicted of murder. A20. On August 22, 1993, the state court imposed a sentence of death. *Id.* Breard's direct appeals of the conviction and

sentence were denied, as was his state petition for habeas corpus. *Id.* It is undisputed that defendants did not begin to permit Paraguay to render consular assistance to Breard until after his direct appeals and state habeas proceedings were exhausted. *E.g.*, A17, A87.

Defendants' failure to advise Breard of his rights, to advise Paraguay of Breard's detention and to afford Paraguay a meaningful opportunity to provide consular assistance to Breard violated both the Vienna Convention and the Friendship Treaty. A7-8, A21-23. These violations caused injury both to the Republic of Paraguay's sovereign interest in protecting the life and liberty of its citizens abroad through its consular officers and to the interests of plaintiffs Prieto and Dos Santos in effectively performing their consular functions. A9, A13, A21-24. Defendants' ongoing failure to provide Paraguay with a meaningful opportunity to exercise its consular communication rights continues to violate the Treaties. A7-8.

The District Court's Decision

In its memorandum opinion, the District Court held that, as a party to the Treaties, Paraguay had standing to sue for redress under the Treaties and that the court had the power to interpret treaties and fashion an equitable remedy for their violation. A119 (opinion to be published at 949 F. Supp. 1269). The court determined that Consul General Dos Santos is a person within the jurisdiction of the United States and therefore a proper plaintiff under section 1983. A121. The court also concluded that, absent any jurisdictional limitations, the case was suitable for declaratory relief. *Id.*

For purposes of deciding the motion, the District Court assumed that the defendants had violated federal law and Breard's death sentence resulted from these violations. A117. The court expressed its "disenchant[ment]" with defendants' violation of the Treaties and pointed to evidence that "the Commonwealth [of Virginia] has disregarded the Vienna Convention on at least one other occasion." A117-18, A121 n.1.

The District Court nevertheless dismissed Paraguay's suit, holding that Paraguay had failed to allege the "ongoing violation" of federal law required to remove the bar of the Eleventh Amendment and to bring the case within the doctrine of *Ex parte Young*. According to the District Court, "[n]ow that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties." A117. The District Court reasoned:

> Plaintiffs urge that but for Virginia's alleged violations of the treaties, Mr. Breard would not be on death row today. Assuming the validity of this assertion, it is a tragic consequence of Virginia's failure to abide by the law. Nonetheless, it is still a *consequence* of the violation and not a continuing wrong.

Id. (emphasis in original). In other words, the District Court ruled that, even though the defendants are preparing to put Breard to death without ever providing Paraguay a meaningful opportunity to afford him the assistance it has a federally guaranteed right to provide, the court was powerless to grant relief.

The District Court also ruled that it lacked subject matter jurisdiction under the *Rooker/Feldman* doctrine, which holds that the district courts have no jurisdiction to review state court judgments on federal questions that are subject to ultimate review in the Supreme Court. A118 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983)). The District Court acknowledged that it was the first forum in which Paraguay had sought relief, that Paraguay sought to vindicate its own rights rather than those of Breard, that the case before it was not an appeal and that Paraguay did not ask it to review trial defects. *Id.* The court nonetheless held that it "ha[d] no authority to disturb a state court ruling regardless of the procedural posture of the litigants," because "that power rests solely with the Supreme Court of the United States." *Id.*

SUMMARY OF ARGUMENT

The District Court wrongly construed the Eleventh Amendment to bar Paraguay's claims. Even if the District Court were correct that defendants' violation of Paraguay's rights has ceased, established precedent holds *Ex parte Young* to authorize suits against state officials for injunctive relief remedying the continuing effects of past violations of federal law, so long as the suit does not seek retroactive damages. Paraguay seeks no money damages. It asks for an injunction directing defendants to eliminate the effects of their abiding refusal to afford Paraguay its substantive rights under the Treaties. Paraguay's suit comes squarely within the tenets of *Ex parte Young*.

In any event, the District Court's conclusion that the defendants had cured their treaty violations is in error. Rather than fulfilling their obligation to provide prompt notice and enable meaningful consular assistance, defendants allowed Paraguay access to Breard only when it was guaranteed to be futile—long after he had been tried, convicted and sentenced to death and had exhausted all appeals and state habeas proceedings. The Treaties secure Paraguay's right to a meaningful opportunity to assist its detained nationals during criminal proceedings. The defendants have never provided Paraguay that opportunity.

The District Court also wrongly decided that the *Rooker/Feldman* doctrine barred Paraguay's suit because the complaint impermissibly sought review of the merits of a final state judgment. The district courts have jurisdiction of actions on treaties of the United States, including actions by foreign states as plaintiffs, and may enjoin enforcement of a state court judgment rendered in violation of federal law. Paraguay was not a party to the state proceedings against Breard, had no possibility of appeal from the state court decisions and had no opportunity to litigate its claims prior to instituting this action. *Rooker/Feldman* therefore does not bar its claims.

ARGUMENT

Standard of Review

"A district court order dismissing a case on the grounds that the undisputed facts establish a lack of subject matter jurisdiction is a legal determination subject to *de novo* appellate review." *Richmond, F.&P. R.R. v. United States*, 945 F.2d 765, 768-69 (4th Cir. 1991) (citation omitted), *cert. denied*,

503 U.S. 984 (1992); *accord White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995); *see also Harter v. Vernon*, 101 F.3d 334, 336-37 (4th Cir. 1996) (questions of applicability of Eleventh Amendment reviewed *de novo*).

Where, as here, no evidence was offered on a Rule 12(b)(1) motion to controvert the complaint's allegations, the Court must assume the truth of the allegations and consider the complaint in the light most favorable to the plaintiff. *White*, 53 F.3d at 44; *see also Dickey v. Greene*, 729 F.2d 957, 958-59 (4th Cir. 1984) (en banc).

I.

BECAUSE IT SEEKS ONLY TO PROSPECTIVELY COMPEL DEFENDANTS TO END THE CONTINUING HARM RESULTING FROM THEIR VIOLATION OF FEDERAL LAW, PARAGUAY'S SUIT IS NOT BARRED BY SOVEREIGN IMMUNITY.

A. Paraguay Seeks Injunctive Relief Against Consequences Of Past Deprivations Of Federal Rights That Is Authorized By *Ex Parte Young*.

In *Ex parte Young*, the Supreme Court held the Eleventh Amendment's sovereign immunity not to apply to suits against state officials acting in their official capacity, provided that the plaintiff sought only a prospective injunction to force the state officials to comply with federal law. 209 U.S. 123, 159-160 (1908). As the Court explained, where a state official acts in a manner inconsistent with federal law,

"[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.*; *accord* U.S. CONST. art. VI, cl. 2.

To come within the *Ex parte Young* doctrine, the plaintiff may seek only prospective injunctive relief, *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), against an "ongoing" violation of federal law from which the plaintiff is currently suffering, *Papasan v. Allain*, 478 U.S. 265, 282 (1986); *see Coakley v. Welch*, 877 F.2d 304, 307 & n.2 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989). This requirement ensures that a plaintiff cannot use *Ex parte Young* to perpetrate "a raid on the state treasury for an accrued monetary liability." *Milliken v. Bradley*, 433 U.S. 267, 290 n.22 (1977); *see also Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1449 (4th Cir. 1994) (actions for "prospective injunctive relief only, rather than any form of retroactive compensatory damages" may be brought, consistent with *Ex parte Young*), *cert. denied*, 116 S. Ct. 60 (1995). At the same time, the availability of injunctive relief under *Ex parte Young* is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Papasan*, 478 U.S. at 278 (internal quotation omitted). Thus, as this Court explained in *Coakley v. Welch*:

> few, if any, suits are barred for failure to allege an "ongoing violation" under *Papasan*. Quite logically, the courts treat the issue of whether a violation is "ongoing" as related to the issues of whether prospective relief is appropriate, or whether the requested relief would operate instead as an illegitimate award of retroactive damages.

877 F.2d at 307 n.2 (citations omitted).

Here, Paraguay seeks no money damages. The relief it requests is that defendants take no further actions based on Breard's illegally obtained conviction, that the conviction be vacated and that Paraguay be given the opportunity to participate meaningfully in any further proceedings against him. A25. The relief sought would put a direct end to the continuing harm Paraguay is suffering. This relief accords with both the express terms and the underlying policy of the *Ex parte Young* doctrine.

Notwithstanding these principles, the District Court held that Virginia's planned execution of Breard, although "a tragic consequence of Virginia's failure to abide by the law," may not be enjoined because it would be a mere "*consequence* of the violation and not a continuing wrong." A117-18 (emphasis in original). The District Court's application of the "ongoing violation" requirement is flatly contradicted by a wealth of controlling authority.

In *Milliken v. Bradley*, the Supreme Court held that the Eleventh Amendment did not preclude a school desegregation order that directed Michigan state officials to prospectively eradicate the *effects* of segregation by paying half the funds necessary to implement a remedial education plan for the Detroit school system. 433 U.S. at 288-90. The Court concluded that the remedial education program was "plainly designed to wipe out continuing conditions of inequality produced by the inherently unequal dual school system long maintained by Detroit." *Id.* at 290. That the education plan would be implemented after *de jure* segregation had been eliminated did not alter the Court's conclusion. *Id.*; *see also*

Stanley v. Darlington County Sch. Dist., 84 F.3d 707, 713 (4th Cir. 1996) (sovereign immunity does not bar federal courts from compelling a state to provide funds to eliminate all vestiges of a previously segregated school system); *Parents for Quality Educ. with Integration, Inc. v. Indiana*, 977 F.2d 1207, 1210-11 (7th Cir. 1992) (state's failure to take "affirmative steps to discharge its duty to dismantle the dual school system that its laws helped to create and maintain . . . constitutes a continuing violation of the Fourteenth Amendment").

Similarly, in *Papasan*, the Supreme Court upheld an equal protection suit brought by students in a Mississippi school district that, the students claimed, was underfunded relative to the rest of the state because, 100 years earlier, the state had sold lands held in trust for the district's public schools. Although the Court expressly acknowledged that the dispute arose from the same past actions that gave rise to a claim for money damages barred by the Eleventh Amendment, it held the plaintiffs nonetheless to be entitled to relief from the current consequences of those past events. The Court held that, given its focus on the present consequences, the plaintiffs' equal protection claim alleged "precisely the type of continuing violation for which a remedy may permissibly be fashioned under *Young*." *Papasan*, 478 U.S. at 282; *see also McConnell v. Adams*, 829 F.2d 1319, 1329-30 (4th Cir. 1987) (reversing money damage award against state officials for unconstitutional refusal to rehire plaintiffs as barred by Eleventh Amendment, but affirming injunction reinstating plaintiffs as authorized under *Young*), *cert. denied*, 486 U.S. 1006 (1988).

This Court applied the same analysis in *Coakley*. Mr. Coakley worked for the South Carolina Port Authority

("SPA") and was fired in violation of the Due Process Clause of the Fourteenth Amendment. He sought prospective injunctive relief in the form of reinstatement. This Court rejected the SPA's argument that reinstatement would violate its sovereign immunity because Coakley had failed to allege an "ongoing violation" of his federal rights:

> We recognize that from one point of view, all Coakley has alleged is that for a period in the past the SPA put him through a process that deprived him of due process rights, but that the process, and any relationship between him and SPA, has ended. This would suggest that his suit against Welch is barred for want of an "ongoing" violation. The view we find more consistent with *Papasan* and *McConnell* is that by his allegations and his prayer for an injunction, Coakley has alleged SPA conduct that, while no longer giving him daily attention, continues to harm him by preventing him from obtaining the benefits of SPA employment.

Coakley, 877 F.2d at 307 n.2; *accord McConnell*, 829 F.2d at 1329-30.[2]

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2. Every circuit court that has addressed this question in the reinstatement context has reached the same conclusion. *Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir.) ("We do not agree . . . that the existence of a past harm renders an otherwise forward-looking injunction retroactive. If it did, the rule allowing prospective relief would be substantially (continued...)

Finally, in *Thomas S. v. Flaherty*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990), this Court upheld an order directing state officials to provide a class of mentally retarded adults with treatment to eliminate the continuing effects of prior mistreatment the class had suffered while in the state's care. The Court was unwilling to accept the officials' argument that class members who were no longer in state custody failed to allege an ongoing violation of federal law: instead, it held that, consistent with the Eleventh Amendment, relief had properly been awarded for class members who were "presently suffering from unconstitutional conditions imposed while in the hospital." *Id.* at 255. The treatment awarded was designed only to address the continuing effects of past unconstitutional conditions and therefore was prospective relief

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2.(...continued)
undermined because the need for prospective relief often arises out of a past injury"), *cert. denied*, 498 U.S. 813 (1990); *Melo v. Hafer*, 912 F.2d 628, 635-36 (3d Cir. 1990), *aff'd on other grounds*, 502 U.S. 21 (1991); *Hall v. Medical College of Ohio*, 742 F.2d 299, 310 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113 (1985); *Elliott v. Hinds*, 786 F.2d 298, 302 (7th Cir. 1986) ("Elliott's alleged wrongful discharge is a continuing violation; as long as the state official keeps him out of his allegedly tenured position the official acts in what is claimed to be derogation of Elliott's constitutional rights"); *Barnes v. Bosley*, 828 F.2d 1253, 1257-58 (8th Cir. 1987); *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 589 (10th Cir. 1994); *Cross v. Alabama*, 49 F.3d 1490, 1503 (11th Cir. 1995).

that "fully comport[ed] with the remedy approved in *Milliken v. Bradley*." *Id.*; *see also Clark v. Cohen*, 794 F.2d 79, 84 (3d Cir.) (a "federal court may order state officials to fund from the state treasury remedial measures found necessary to undo the harmful effects of past constitutional violations"), *cert. denied*, 479 U.S. 962 (1986).

Like the plaintiffs in the desegregation, reinstatement and mental health cases, Paraguay currently suffers from the "tragic consequence[s] of [state officials'] abiding failure to abide by the law." A117. Where, as here, the relief requested cannot be construed as a demand for money damages, the doctrine of *Ex parte Young* authorizes federal courts to grant relief. The District Court's ruling would eviscerate a doctrine that has proved "indispensable to the establishment of constitutional government and the rule of law." CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 312 (5th ed. 1994). Its decision should be reversed.

B. Paraguay Seeks An Injunction Against An Ongoing Violation Of Its Rights Under Two Treaties.

A second ground for reversal of the District Court's Eleventh Amendment holding is its error in construing the rights accorded and obligations imposed by the Treaties so narrowly as to find no ongoing violation. The District Court's Eleventh Amendment analysis was based on the erroneous premise that defendants' obligations under the Treaties were fully satisfied by permitting Paraguay to provide consular assistance to Breard at a time when it was useless and meaningless: *after* Breard had been arrested, arraigned, tried

and sentenced to death, had exhausted all appeals and state habeas proceedings and was scheduled for execution. *See* A117 ("Now that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties"). Contrary to the District Court's restrictive reading, the Treaties guarantee the right to provide *meaningful* consular assistance to a state's detained nationals. Because the defendants continue to deny Paraguay the opportunity to provide assistance to Breard at a time and in a context where their assistance could meaningfully affect the outcome or conduct of the case against him, their violation of Paraguay's rights is an ongoing and continuing one—even giving "ongoing violation" the restrictive meaning the District Court accorded it.

"[A] treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it.'" *United States v. Stuart*, 489 U.S. 353, 368 (1988) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)); *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). "[E]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Stuart*, 489 U.S. at 368 (internal quotation omitted). This general rule of liberal construction is supplemented by the Vienna Convention's specific directive that domestic law be applied so as to "enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Vienna Convention, art. 36(2).

The signatories to the Treaties at issue here required *prompt* notification of a national's detention to ensure that their respective consular officers could provide meaningful

assistance to the national's defense, at trial and before. The Vienna Convention requires the authorities of the arresting state "without delay" to inform the detained national of his right to consular assistance, and also requires them, upon the national's request, "without delay [to] inform the consular post . . . if . . . a national of that state is arrested . . . or detained in any other manner." Vienna Convention, art. 36(1)(b). By virtue of its most-favored-nation clause, the Friendship Treaty likewise requires that a consular officer shall "immediately" be notified of a national's arrest and provided access to the national no more than four days after the arrest. *E.g.*, Consular Convention, June 1, 1964, U.S.-U.S.S.R., art. 12(2)-(3) & §§ 1-2 of protocol, 19 U.S.T. 5018, 5027, 5039 (providing privileges of immediate notification and access to Soviet consuls); *see* Friendship Treaty, art. XII (Paraguayan consuls entitled to privileges of most favored nation); *see also Santovincenzo v. Egan*, 284 U.S. 30, 35-36 (1931) (under most-favored-nation clause such as that in Friendship Treaty, rights and privileges provided other consuls under other treaties inure to benefit of consul invoking clause).

Reference to nation-state practice is unnecessary given the clear language of the Treaties here. *See Eastern Airlines v. Floyd*, 499 U.S. 530, 535 (1991) (where there are "difficult or ambiguous passages" in a treaty, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (internal quotation omitted). Nonetheless, state practice underscores that the District Court's crabbed reading of the rights accorded by the Treaties was in error. As United States Department of State has stressed:

> Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly. . . . Serious problems in this regard [concerning provision of consular notification "without delay"] have been experienced by American consular officers in countries of Eastern Europe, where . . . detention of an individual for prolonged "interrogation" prior to the filing of formal charges is officially sanctioned. During this period of days, weeks, or even months, authorities of the receiving state may decline to observe that State's obligation to make notification to consular officials of the sending State. *Clearly this type of procedure is not in keeping with either the letter or the spirit of the Vienna Convention.*

ARTHUR W. ROVINE, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1973, 161 (1973) (emphasis supplied); *see Commentary on Draft Articles on Consular Relations Adopted by the International Law Commission at Its 13th Session*, U.N. GAOR, Conf. on Consular Relations, annex, art. 36, UN Doc. A/CONF. 25/6, *reprinted in* 2 UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS, OFFICIAL RECORDS 24 (1963) (article 36 intended, among other things, to enable consular assistance "where a national of the sending State has been placed in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgment is still open to appeal or cassation; and also cases

where the judgment convicting the national has become final.") (*hereinafter* OFF. REC.).[3]

The clear intent of the Treaties' provisions for prompt notification and access is to provide consular officers the opportunity to assist the national at a time and in a context where such assistance can be most useful to the national and most effective in the exercise of consular functions. By holding that the provision of consular access *three years* after Breard's trial and conviction satisfied the Treaties' requirement of prompt notification and access, the District Court departed from the unambiguous text and intent of the Treaties. In the most fundamental sense, so long as defendants continue to detain Breard and to take steps to carry out a death sentence rendered without permitting the notification and access to which Paraguay is entitled, defendants continue to violate Paraguay's rights under the Treaties.

---

3. Article 36(2)'s requirement that local law give "full effect" to the article's purposes was adopted over an amendment proposed by the Soviet Union which would have permitted domestic law to impair the rights accorded in Article 36 so long as they did not render them completely inoperative. U.N. GAOR, Conf. on Consular Relations, 12th plen. mtg., agenda item 10, ¶¶ 2-9, UN Doc. A/CONF. 25/SR. 12, 17 April 1963, p. 1, *reprinted in* 1 OFF. REC. 40; *see id.* (statement by Mr. Khlestov, USSR) (stating that article 36(2) could "force States to alter their criminal laws and regulations and allow consuls to interfere with normal legal procedures in order to protect alien offenders").

II.

THE DISTRICT COURT HAD JURISDICTION OVER PARAGUAY'S ACTION TO VINDICATE ITS TREATY RIGHTS BECAUSE PARAGUAY WAS NOT A PARTY TO THE STATE COURT ACTION AND HAD NO APPEAL TO THE SUPREME COURT.

The District Court also erred in holding that Paraguay's action effectively sought review of a state court judgment which could be reviewed only by habeas corpus petition or by the Supreme Court. A118 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Paraguay was not a party to the state court proceedings, its claims were not presented to that court, no appeal by Paraguay from the state proceedings could be had, Paraguay has no habeas remedy and it seeks no review in this action of any ruling by the state court. Under established principles of federal law, the District Court has original jurisdiction over this action and the *Rooker/Feldman* doctrine does not operate as a bar.

A. The District Court Has Jurisdiction Over Paraguay's Action To Enforce Treaty Rights Violated By State Officials.

The federal district courts have jurisdiction of actions arising under treaties of the United States. 28 U.S.C. § 1331 ("district courts shall have original jurisdiction of all civil actions arising under the . . . treaties of the United States"). As part of the "supreme Law of the Land," U.S. CONST. art. VI, cl. 2, the interpretation of treaties has long been held to be

"the peculiar province of the judiciary." *Jones v. Meehan*, 175 U.S. 1, 32 (1899).

"[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do." *Pfizer, Inc. v. India*, 434 U.S. 308, 318-19 (1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12 (1964) (unless foreign state is at war with or not recognized by United States, courts of this country are open to it); *see also* 28 U.S.C. § 1332(a)(4) (providing jurisdiction over actions brought by a foreign state "as plaintiff" in the district courts).

And "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). In appropriate circumstances, such as those here, a district court may enjoin any further action to enforce a state court judgment rendered in violation of federal law. *See, e.g., French v. Hay*, 89 U.S. (22 Wall.) 250, 252-53 (1874); *United States v. Owens*, 54 F.3d 271, 276-77 (6th Cir.), *cert. dismissed*, 116 S. Ct. 492 (1995); *Munoz v. County of Imperial*, 667 F.2d 811, 814, 817 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982).

B. The *Rooker/Feldman* Doctrine Does Not Bar Paraguay's Claims.

In holding that the *Rooker/Feldman* doctrine applied "regardless of the procedural posture of the litigants," A118, the District Court failed to apply the dispositive decisions of

the Supreme Court and every circuit to consider the question. Under the *Rooker/Feldman* doctrine, "*a party losing in state court* is barred from seeking what in substance would be appellate review of the state judgment in a United States District Court." *Johnson v. De Grandy*, 114 S. Ct. 2647, 2654 (1994) (emphasis supplied). The basis for the doctrine is that Congress intended the Supreme Court to have exclusive appellate jurisdiction over state court decisions on federal law pursuant to 28 U.S.C. § 1257. *Feldman*, 460 U.S. at 476; *Rooker*, 263 U.S. at 416 (citing predecessor statute); *see also Leonard v. Suthard*, 927 F.2d 168, 169 (4th Cir. 1991).

Rooker/Feldman expresses a jurisdictional constraint that imposes order on the flow of federal question cases in the federal courts system: if a party litigates a federal question in the state courts and loses, that party may seek review of that federal question only in the Supreme Court and may not attempt to evade the requirements of section 1257 by invoking the district courts' original jurisdiction over that same question under section 1331. *Feldman*, 460 U.S. at 476; *Rooker*, 263 U.S. at 416; *see also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 622-23 (1989); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4469 (1981) (doctrine mandates, in essence, "that federal courts must honor the res judicata effects of state court judgments").

Contrary to the District Court's ruling, just three years ago the Supreme Court affirmed that, where the federal plaintiff was not a party in state court and had no opportunity to appeal the state court judgment to the Supreme Court, the plaintiff's claims are not barred by *Rooker/Feldman*. *Johnson*

v. De Grandy, 114 S. Ct. at 2654.[4] In *De Grandy*, the Florida Supreme Court had upheld the constitutionality of an electoral redistricting enacted by the Florida legislature. 114 S. Ct. at 2652. The United States thereafter brought suit in federal district court under section 2 of the Voting Rights Act, alleging that the redistricting diluted minority voting strength. *Id.* The Supreme Court rejected Florida's argument that *Rooker/Feldman* was a bar because the United States was effectively seeking review of the Florida Supreme Court's decision in district court: "unlike Rooker or Feldman, the United States was not a party in the state court." *Id.* at 2654. Because the United States "was in no position to ask th[e Supreme] Court to review the state court's judgment" and was

---

4. Every circuit to consider the question has likewise held, consistent with *De Grandy*, that *Rooker/Feldman* is no bar to a federal plaintiff who was not a party to the state court proceedings and therefore had no right of appeal to the Supreme Court. *Schneider v. Colegio de Abogados*, 917 F.2d 620, 629 (1st Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840-41 & n.4 (3d Cir. 1996); *E.B. Elliot Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141, 1148-49 (5th Cir.), *cert. dismissed*, 400 U.S. 805 (1970); *United States v. Owens*, 54 F.3d at 274; *Leaf v. Supreme Court of Wisconsin*, 979 F.2d 589, 597-98 (7th Cir. 1992), *cert. denied*, 508 U.S. 941 (1993); *McCurry v. Tesch*, 738 F.2d 271, 274 & n.3 (8th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985); *Roe v. Alabama*, 43 F.3d 574, 580 (11th Cir.), *certifying questions to* 676 So. 2d 1206 (Ala.), *on receipt of answers to certified questions*, 52 F.3d 300 (11th Cir.), *cert. denied*, 116 S. Ct. 276 (1995).

"merely seek[ing] to litigate its § 2 case for the first time," *Rooker/Feldman* did not bar it from proceeding in the federal courts. *Id.*

Like the United States in *De Grandy*, Paraguay was not a party to the state court proceedings. It seeks for the first time an injunction in federal court against Virginia's continuing interference with its federally-protected consular functions. The *Rooker/Feldman* doctrine does not bar its claims.[5]

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5. The District Court also cited in its *Rooker/Feldman* discussion the decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), which defendants had urged as an independent ground for dismissal. It is unclear whether the District Court viewed *Preiser* as additional support for its ruling that *Rooker/Feldman* bars Paraguay's claims, as it appeared to cite *Preiser* only for the undisputed proposition that *Rooker/Feldman* does not bar federal habeas review of state court decisions. *See* A118. In any event, *Preiser* provides no such support.

The issue in *Preiser* was whether, where both 42 U.S.C. § 1983 and 28 U.S.C. § 2254 provided a remedy, a state prisoner could elect to proceed under the more general provisions of section 1983. 411 U.S. at 482-90. While acknowledging that section 1983's broad language literally encompassed the prisoners' claims, the Court held that "the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a

(continued...)

Under no rationale can the state court judgment preclude Paraguay's claim here. The essence of Paraguay's claim is that it was deprived of its federally protected right to assist its citizen because it was never informed of the existence of the proceedings against him. By suggesting that the very proceeding from which Paraguay was unlawfully excluded could preclude Paraguay from asserting its right to assist in such proceedings, the District Court engaged in circular reasoning that finds no support in the authority on which it relied. The state court judgment is the event which gives rise to Paraguay's claim. It cannot at the same time pose a bar to that claim.

5.(...continued)
situation like this where it so clearly applies." 411 U.S. at 489.

Here, on its own terms, *Preiser* does not apply. The defendants never contended that Paraguay had a remedy under the federal habeas statute. Unlike the Court in *Preiser*, the District Court here was not called upon to decide between a general statute and a specific statute, either of which could provide complete relief on the facts pleaded. *See Preiser*, 411 U.S. at 488.

CONCLUSION

The District Court's order should be reversed and this action should be remanded for further proceedings.

Dated: March 4, 1997

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ADDENDUM REPRODUCING FEDERAL AUTHORITY

TREATIES

1.

Vienna Convention on Consular Relations,
Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261

* * *

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular

post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

2.

Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091

* * *

Article XII

* * *

The diplomatic agents and consuls of the United States of America in the territories of the Republic of Paraguay shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to the diplomatic agents and consuls of any other nation whatever; and, in like manner, the diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever.

3.

Consular Convention, June 6, 1951, U.S.-U.K., 3 U.S.T. 3426

* * *

Article 16

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when

any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

4.

Consular Convention, June 1, 1964, U.S.-U.S.S.R., 19 U.S.T. 5018

* * *

Article 12

* * *

2. The appropriate authorities of the receiving state shall immediately inform a consular officer of the sending state about the arrest or detention in other form of a national of the sending state.

3. A consular officer of the sending state shall have the right without delay to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody or is serving a sentence of imprisonment. The rights referred to in this paragraph shall be exercised in conformity with the laws and regulations of the receiving state,

subject to the proviso, however, that the said laws and regulations must not nullify these rights.

* * *

PROTOCOL

To the Consular Convention Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics

1. It is agreed between the Contracting Parties that the notification of a consular officer of the arrest or detention in other form of a national of the sending state specified in paragraph 2 of Article 12 of the Consular Convention between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics of June 1, 1964, shall take place within one to three days from the time of arrest or detention depending on conditions of communication.

2. It is agreed between the Contracting Parties that the rights specified in paragraph 3 of Article 12 of the Consular Convention of a consular officer to visit and communicate with a national of the sending state who is under arrest or otherwise detained in custody shall be accorded within two to four days of the arrest or detention of such national depending upon his location.

5.

**Agreement on Consular Relations, Jan. 31, 1979, U.S.-China,
30 U.S.T. 17**

* * *

5. If a citizen of the sending country is arrested or detained in any manner, the authorities of the receiving country shall, without delay, notify the consular post or embassy accordingly of the arrest or detention of the person and permit access by a consular officer of the sending state to the citizen who is under arrest or detained in custody.

STATUTES

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 1988), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (WESTLAW through all 1996 legislation).

CERTIFICATE OF SERVICE

I, Daniel C. Malone, a law clerk with Debevoise & Plimpton, attorneys for plaintiffs-appellants the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José Antonio Dos Santos, hereby certify under penalty of perjury that I have, this 4th day of March, 1997, caused eight copies of the foregoing Plaintiffs'-Appellants' Brief, together with six copies of the Joint Appendix, to be filed by first class mail with the Clerk of Court and caused two copies of said brief and one copy of said appendix to be served by first class mail on each of the following:

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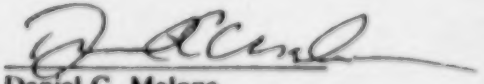

Daniel C. Malone

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

REPUBLIC OF PARAGUAY, et al.,

Appellants

v.

GEORGE ALLEN, GOVERNOR OF VIRGINIA, et al.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia Richmond Division

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Other Authority

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Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was

violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983 (West 1988), *as amended by* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (WESTLAW through all 1996 legislation).

CERTIFICATE OF SERVICE

I, Daniel C. Malone, a law clerk with Debevoise & Plimpton, attorneys for plaintiffs-appellants the Republic of Paraguay, Ambassador Jorge J. Prieto and Consul General José Antonio Dos Santos, hereby certify under penalty of perjury that I have, this 4th day of March, 1997, caused eight copies of the foregoing Plaintiffs'-Appellants' Brief, together with six copies of the Joint Appendix, to be filed by first class mail with the Clerk of Court and caused two copies of said brief and one copy of said appendix to be served by first class mail on each of the following:

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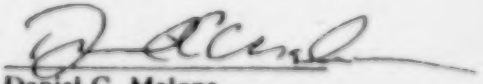

Daniel C. Malone

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

REPUBLIC OF PARAGUAY, et al.,

Appellants

v.

GEORGE ALLEN, GOVERNOR OF VIRGINIA, et al.,

Appellees

On Appeal from the United States District Court for the Eastern District of Virginia Richmond Division

---

APPELLEES' BRIEF

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On Appeal from the United States District Court for the Eastern District of Virginia Richmond Division

---

APPELLEES' BRIEF

ISSUE PRESENTED

Did the district court correctly rule that, outside the limited parameters of a proceeding under 28 U.S.C. § 2254, the lower federal courts have no jurisdiction to review the validity of a state prisoner's conviction or sentence, or to declare that a state court criminal judgment is unenforceable?

STATEMENT OF THE CASE

This is a case in which the Republic of Paraguay and two of its officials attempted to come to the aid of an admitted capital murderer, Virginia death row prisoner Angel Francisco Breard. In August of 1996, Breard filed a habeas corpus petition in the United States District Court for the Eastern District of Virginia. One of Breard's many claims, but one upon which he placed primary emphasis, was an allegation that both his capital murder conviction and death sentence were unconstitutional because, at the time of his arrest, the Virginia authorities failed to advise him that, pursuant to the Vienna Convention on Consular Relations ("Vienna Convention"), he had the right to contact the Paraguayan consulate. Because Bread never had raised his claim in state court, however, it was obvious from the outset of his federal habeas proceedings that, at the very least, he faced severe procedural obstacles to obtaining collateral relief upon such a claim.

It was at this point that the plaintiffs attempted to come to Breard's rescue. On September 12, 1996, they filed the instant action under 28 U.S.C. § 1331 and 42 U.S.C. § 1983 in the same federal district court where Breard's habeas petition was pending. Paraguay and its two officials asked the district court to declare that all the named defendants--from Governor Allen to the Chief of Police in Arlington County--had violated, not only the Vienna Convention, but also the Friendship, Commerce and Navigation ("FCN") Treaty of 1859. This would have been remarkable, by itself, but the plaintiffs did not stop there. From the outset of the litigation, up to and including the oral argument that the district court heard on November 26, 1996, they consistently made clear ***that the only possible remedy for the alleged violations was for the***

court to declare Breard's capital murder conviction and death sentence void and to enjoin the defendants from taking any steps to carry out the conviction or sentence.

On November 27, 1996, the district court determined that it did not have jurisdiction to grant the relief requested by the plaintiffs. Paraguay v. Allen, 949 F. Supp. 1269 (E.D. Va. 1996). (App. 116-118, 123). On that same date, the district court also dismissed Breard's habeas petition, after specifically finding that his "Vienna Convention" claim was barred from federal collateral review by his failure to raise it in state court. Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996).

The plaintiffs filed their notice of appeal in the district court on December 5, 1996. (App. 5).

STATEMENT OF FACTS

The Virginia Supreme Court found the facts surrounding Breard's capital offense to be as follows:

> In February 1992, the victim, Ruth Dickie, resided alone at 4410 North Fourth Road, Apartment 3, in Arlington County. She was 39 years of age and unmarried. Breard was living in an apartment a short distance from Dickie's apartment.
>
> About 10:00 or 10:15 p.m. on February 17, 1992, Dickie left an Arlington restaurant. About 10:30 or 10:45 p.m., Ann Isch, who lived in an apartment directly below Dickie's, heard Dickie and a man arguing loudly in the hall. Isch heard Dickie say, "[K]eep your hands off me." According to Isch, the arguing continued as she heard Dickie and the man enter Dickie's apartment. Almost immediately thereafter, when everything became quiet, Isch called the apartment complex maintenance man.
>
> Upon receiving Isch's call, the maintenance man, Joseph King, went to Dickie's apartment. King knocked on the apartment door and heard "something that sounded like something being drug

across the floor." After receiving no response to his knocking, King called the police.

When the police arrived, King gave them a master key. Upon entering the apartment, the police found Dickie lying on the floor. She was on her back, naked from the waist down, and her legs were spread wide. She was bleeding profusely and did not appear to be breathing.

The police observed a "shiny...dried...body fluid" on Dickie's pubic hair and on her inner thigh. Hairs were found clutched in her bloodstained hands and on her left leg. Dickie's underpants had been torn from her body. The police found Dickie's eyeglasses, without one lens, in the living room, and the missing lens was found under her body. A telephone receiver located near her head was covered with blood. In the room where Dickie's body was found, the police also found her shoes and her pants with some buttons missing. Dickie's purse was on the floor just inside the front door, and her set of keys was on the floor between her legs.

An autopsy revealed that Dickie had sustained five stab wounds to the neck. Two of the wounds would have caused her death.

The body fluid found on Dickie's pubic hair and inner thigh was subjected to a serological examination and identified as semen. No semen was detected on vaginal or anal swabs.

In the course of their investigation, the police obtained a sample of Breard's blood and samples of his head and pubic hair. The hair samples were subjected to microscopic examination, and the blood sample was subjected to enzyme testing and DNA analysis.

The foreign hairs found on Dickie's body were determined to be identical in all microscopic characteristics to the hair samples taken from Breard. The hairs found clutched in Dickie's hand were Caucasian hairs "microscopically like" Dickie's own head hair and bore evidence that they had been pulled from her head by the roots.

The semen found on Dickie's pubic hair matched Breard's enzyme typing in all respects. On all five of the genetic probes used in the DNA testing, Breard's DNA profile matched the DNA profile of the semen found on Dickie's body.

> Breard is a native of Argentina, and his DNA profile occurs in only one in seventeen million members of the Hispanic population. Only 1.7% of the general population has Breard's enzyme typing.
>
> At trial, Breard testified in his own defense. He stated that, on the night of February 17, 1992, he left his apartment armed with a knife because he thought he would "try to do someone," meaning that he "wanted to use the knife to force a woman to have sex with [him]." Breard admitted that he engaged Dickie in conversation on the street, followed her to her apartment, argued with her, and forced himself into her apartment. Breard also admitted that he stabbed Dickie, removed her pants, and got "on top of her." While he was on Dickie, he heard someone knocking on the door. He "got scared," opened a kitchen window, jumped to the ground, and fled. Breard also testified that, at the time, he believed that he was under a curse placed upon him by his ex-wife's father.

Breard v. Commonwealth, 248 Va. 68, 72-73, 445 S.E.2d 670, 673-674 (1994).

Breard was arrested in Arlington on August 17, 1992. There is no evidence that he was advised by the arresting authorities that he could contact the consulate of a foreign country; nor is there any evidence that he sought to make such contact but was denied. It is undisputed, however, that the state court promptly appointed two attorneys to represent Breard and that those attorneys were free to contact whomever they saw fit.

On June 24, 1993, after a 3½ day trial, a jury in the Circuit Court of Arlington County convicted Breard of capital murder and attempted rape. The jury fixed Breard's punishment for the attempted rape at 10 years imprisonment and a fine of $100,000.

The trial court conducted a separate sentencing proceeding on June 24-25, 1993. After considering all the evidence in aggravation and mitigation, the jury sentenced Breard to death for the capital offense, finding that he represented a continuing serious threat to society ***and*** that his offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim. See Va. Code § 19.2-264.4.

The trial judge conducted yet another sentencing proceeding on September 9, 1993, at which the court considered additional evidence introduced on Breard's behalf. At the conclusion of that hearing, however, the court imposed final judgment in accordance with the jury's verdicts. At no time in the trial court did Breard raise claims regarding alleged treaty violations or the authorities' alleged failure to advise him at the time of his arrest that he could contact a foreign consulate.

Breard's convictions and sentences were affirmed by the Supreme Court of Virginia on June 10, 1994. Breard v. Commonwealth, 248 Va. 68, 445 S.E.2d 670 (1994). With respect to the evidence warranting the death penalty, the Court found as follows:

> In the penalty phase of the trial, the Commonwealth presented evidence that Breard had attacked two other women. Approximately three weeks before Breard murdered Dickie, he attacked Celia Gonzales on a street in Arlington County. He grabbed Gonzales from behind, ordered her to accompany him, and told her that he had a gun. Breard ultimately released Gonzales after he had been observed by a man sitting in a nearby parked car. Before leaving, Breard told Gonzales that he knew where she lived and that he "[had] someone who's going to get [her] later."
>
> On August 17, 1992, six months after Dickie's murder, Breard attempted to sexually assault Jeanine Yvonna Price. Breard and Price had met in Washington, D.C., and the two traveled, in Breard's automobile, to Breard's Arlington apartment.
>
> At the apartment, Breard began kissing Price "all over." Price resisted, but Breard pulled her to the floor, sat on her stomach, and started to remove her clothing. Eventually, he removed all of her clothing and started to remove his pants.
>
> Price began screaming for help, and Breard responded by hitting her in the face and ordering her to be quiet. Breard attempted to tie Price's hands with a telephone cord and told her that he intended to have anal intercourse with her.

> A man in a nearby apartment heard Price's screams and called the police. When the police arrived, they found Price, naked and hysterical, and Breard clad only in his undershorts. Breard was arrested and, at that time, became a suspect in Dickie's murder.

Breard, 248 Va. at 85, 445 S.E.2d at 680. In his appeal to the Virginia Supreme Court, Breard did not claim that any treaties had been violated in his case.

After his appeal to the Virginia Supreme Court, Breard petitioned the United States Supreme Court for a writ of certiorari. The Supreme Court, however, denied the certiorari petition on October 31, 1994. Breard v. Virginia, 115 S.Ct. 442 (1994).

On October 24, 1994, the Circuit Court of Arlington County appointed new counsel to represent Breard in his state habeas corpus proceedings. Breard filed his state petition on May 1, 1995. The petition raised no claim regarding any alleged treaty violations. The Circuit Court dismissed the petition on June 29, 1995. Breard subsequently filed a motion to reconsider which the state court denied on July 24, 1995.

Breard then filed a petition for appeal in the Virginia Supreme Court on September 28, 1995. On October 11, 1995, however, the Virginia Supreme Court granted Breard's request to file an amended petition for appeal, which Breard filed October 30, 1995. Once again, Breard raised no claim that any treaties had been violated in his case. The Virginia Supreme Court refused the amended petition for appeal on January 17, 1996. Breard's petition for rehearing was denied on March 1, 1996.

On April 29, 1996, the district court granted Breard's request for a stay of execution and on May 2, 1996, appointed counsel to represent Breard in his federal habeas proceedings. Breard subsequently filed a 71-page habeas petition on August 30, 1996. In that petition, Breard for the first time claimed that his conviction and sentence should be overturned because of an

alleged violation of the Vienna Convention. After hearing oral argument on the respondent-Warden's motion to dismiss, the district court dismissed Breard's petition on November 27, 1996. Breard v. Netherland, 949 F. Supp. 1255 (E.D. Va. 1996). As previously noted, the court specifically found that Breard's "Vienna Convention" claim was procedurally defaulted by his failure to raise it in state court. Id. at 1263.

Breard's appeal from the district court's denial of federal habeas relief is pending in this Court. See Breard v. Netherland, No. 96-25.

SUMMARY OF THE ARGUMENT

The plaintiffs have maintained consistently throughout this litigation that the *only* relief that can remedy the wrong they allegedly have suffered is for the federal courts to invalidate and declare unenforceable Angel Breard's capital murder conviction and death sentence. The law is quite clear, however, that neither the district court nor this Court may grant such relief, except in the context of Breard's pending habeas corpus proceedings under 28 U.S.C. § 2254. The Eleventh Amendment of the Constitution and the Supreme Court's "Feldman" doctrine prohibit a lower federal court from *directly* reviewing or invalidating the judgment of a state court. State court criminal judgments may be reviewed by a lower federal court *collaterally*, but only within the limited parameters of a § 2254 proceeding.

Breard's treaty-based habeas claim undoubtedly is procedurally barred by his failure to have raised the claim in state court, and the district court so found in Breard's § 2254 proceeding. The plaintiffs cannot be permitted to obtain for Breard through the back door of the federal courthouse the very same relief that Breard is prohibited from obtaining through the front door.

When one party to a treaty has a complaint against another party, moreover, the controversy falls squarely within the "political question" doctrine. Such inherently political issues are not justiciable by the federal courts.

This Court, therefore, should affirm the district court's dismissal of the plaintiffs' suit. Ten of the eleven named defendants' sole connection to the case is their sworn duty as Virginia public officials to carry out Breard's conviction and sentence unless or until a court of competent jurisdiction overturns those judgments. That, however, is a judicial remedy unavailable in this proceeding. On the other hand, the one remaining defendant, the currently Acting Police Chief of Arlington County, is a local official who has no role or authority in carrying out Breard's conviction or sentence and, therefore, has no connection whatever to the remedy which the plaintiffs have specified is indispensable to its suit.

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION TO GRANT THE RELIEF REQUESTED BY THE PLAINTIFFS.[1]

A. The Eleventh Amendment

The Eleventh Amendment of the United States Constitution is remarkably short and unequivocal: "The judicial power of the United States shall not be construed to extend to any

[1] In the district court, the plaintiffs premised the subject matter jurisdiction of their suit solely upon 28 U.S.C. § 1331. (App. 8). On appeal, they rely not only upon § 1331, but § 1332(a)(4) as well. (Pl. Br. 1). Because § 1332(a)(4) was not asserted in the district court, it cannot be asserted for the first time on appeal. See generally Spencer v. Murray, 5 F.3d 758, 762 (4th Cir. 1993), cert. denied, 510 U.S. 1171 (1994); McGowan v. Gillenwater, 429 F.2d 586, 587 (4th Cir. 1970) (per curiam). In any event, § 1332(a)(4) clearly does not apply here because the plaintiffs' suit does not -- and could not -- request money damages (see below at 18 n.5) and the jurisdictional statute requires that "the matter in controversy exceeds the sum or value of $50,000."

suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The Supreme Court consistently has held "that the Eleventh Amendment bar[s] a suit brought against a State by a foreign state." Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1129 (1996), citing Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

It is, therefore, beyond question that, if the plaintiffs had named the Commonwealth of Virginia as the defendant in their suit, the Eleventh Amendment would have interposed an absolute bar. The plaintiffs contend, however, that it successfully has circumvented that bar by naming various Virginia officials as the defendants, and that Ex parte Young, 209 U.S. 128 (1908), authorizes the suit because they merely are seeking "prospective" relief for what they consider to be Virginia's "continuing violation" of the treaties. (Pl. Br. 2, 10-20). The district court correctly rejected this argument for several reasons:

1. Ex Parte Young

As the Supreme Court recently noted in Seminole Tribe, since Ex parte Young was decided, the Court often has "found federal jurisdiction over a suit against a state official when that suit seeks only prospective injunctive relief in order to 'end a continuing violation of federal law.'" Seminole Tribe, 116 S.Ct. at 1132, quoting Green v. Mansour, 474 U.S. 64, 68 (1985). Under Ex parte Young, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials ***to conform their future conduct to the requirements of federal law***." Quern v. Jordan, 440 U.S. 332, 337 (1979) (emphasis added). By definition, then, Ex parte Young does not apply "to claims for retrospective relief." Green, 474 U.S. at 68.

That aspect of the plaintiffs' suit that asked the district court in 1996 to invalidate

Breard's 1993 state court conviction and sentence (App. 25) clearly was a request for retrospective, rather than prospective, relief and, therefore, did not fall within the ambit of Ex parte Young. That the suit was retrospective, at least in part, also is demonstrated by one of the plaintiffs' request for a "reinstating [of] the status quo as of the time [the] plaintiffs rights were violated." (App. 7).

Seminole Tribe, moreover, makes clear that, even if the relief sought is deemed to be "prospective," the broader remedies under Ex parte Young are unavailable if Congress has created a limited remedial scheme by statute. Seminole Tribe, 116 S.Ct. at 1132-1133. As will be demonstrated below, Congress has made it abundantly clear that the "limited remedial scheme" embodied in § 2254 proceedings is the ***exclusive*** federal forum for litigating the validity of a state prisoner's conviction or sentence. (See below at 17-19).

Ex parte Young also is inapplicable in a case such as this where the State is the "real, substantial party in interest." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984). It would be difficult to imagine a case in which the State is more the "real, substantial party in interest" than a federal civil suit where the indispensable relief sought by the plaintiffs is the overturning of the State's presumptively valid criminal judgment against a death row prisoner. Indeed, all but one of the named defendants have no connection to the plaintiffs' suit other than their sworn duty as Virginia public officials to carry out the State's judgment unless or until that judgment is overturned by a court of competent jurisdiction. On the other hand, the one other named defendant, the currently Acting Police Chief of Arlington County, is a local official who has no connection to the relief sought by the plaintiffs. While Ex parte Young and Congress' specific authorization of § 2254 proceedings allow federal courts to

Per Curiam

SUPREME COURT OF THE UNITED STATES

Nos. 97–8214 (A–732), 97–1390 (A–738), 97–8660 (A–767), and No. 125, Orig. (A–771)

ANGEL FRANCISCO BREARD
97–8214 (A–732) *v.*
FRED W. GREENE, WARDEN

ON APPLICATION FOR STAY AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THE REPUBLIC OF PARAGUAY ET AL.,
97–1390 (A–738) *v.*
JAMES S. GILMORE, GOVERNOR OF VIRGINIA, ET AL.

ON APPLICATION FOR STAY OR INJUNCTION AND ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

IN RE ANGEL FRANCISCO BREARD
97–8660 (A–767)

ON APPLICATION FOR STAY AND ON PETITION FOR WRIT OF HABEAS CORPUS

REPUBLIC OF PARAGUAY ET AL.,
No. 125 Orig. (A–771) *v.*
JAMES GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

ON APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

[April 14, 1998]

PER CURIAM.

Angel Francisco Breard is scheduled to be executed by the Commonwealth of Virginia this evening at 9:00 p.m.

Breard, a citizen of Paraguay, came to the United States in 1986, at the age of 20. In 1992, Breard was charged with the attempted rape and capital murder of Ruth Dickie. At his trial in 1993, the State presented overwhelming evidence of guilt, including semen found on Dickie's body matching Breard's DNA profile and hairs on Dickie's body identical in all microscopic characteristics to hair samples taken from Breard. Breard chose to take the witness stand in his defense. During his testimony, Breard confessed to killing Dickie, but explained that he had only done so because of a Satanic curse placed on him by his father-in-law. Following a jury trial in the Circuit Court of Arlington County, Virginia, Breard was convicted of both charges and sentenced to death. On appeal, the Virginia Supreme Court affirmed Breard's convictions and sentences, *Breard* v. *Commonwealth*, 248 Va. 68, 445 S. E. 2d 670 (1994), and we denied certiorari, 513 U. S. 971 (1994). State collateral relief was subsequently denied as well.

Breard then filed a motion for habeas relief under 28 U. S. C. §2254 in Federal District Court on August 20, 1996. In that motion, Breard argued for the first time that his conviction and sentence should be overturned because of alleged violations of the Vienna Convention on Consular Relations (Vienna Convention), April 24, 1963, [1970] 21 U. S. T. 77, T.I.A.S. No. 6820, at the time of his arrest. Specifically, Breard alleged that the Vienna Convention was violated when the arresting authorities failed to inform him that, as a foreign national, he had the right to contact the Paraguayan Consulate. The District Court rejected this claim, concluding that Breard procedurally defaulted the claim when he failed to raise it in state court and that Breard could not demonstrate cause and prejudice for this default. *Breard* v. *Netherland*, 949 F. Supp. 1255, 1266 (ED Va. 1996). The Fourth Circuit affirmed. *Breard* v. *Pruett*, 134 F. 3d 615, 620 (1998). Breard has

petitioned this Court for a writ of certiorari.

In September 1996, the Republic of Paraguay, the Ambassador of Paraguay to the United States, and the Consul General of Paraguay to the United States (collectively Paraguay) brought suit in Federal District Court against certain Virginia officials, alleging that their separate rights under the Vienna Convention had been violated by the Commonwealth's failure to inform Breard of his rights under the treaty and to inform the Paraguayan consulate of Breard's arrest, conviction, and sentence. In addition, the Consul General asserted a parallel claim under 42 U. S. C. §1983, alleging a denial of his rights under the Vienna Convention. The District Court concluded that it lacked subject-matter jurisdiction over these suits because Paraguay was not alleging a "continuing violation of federal law" and therefore could not bring its claims within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U. S. 123 (1908). *Republic of Paraguay* v. *Allen*, 949 F. Supp. 1269, 1272–1273 (ED Va. 1996). The Fourth Circuit affirmed on Eleventh Amendment grounds. *Republic of Paraguay* v. *Allen*, 134 F. 3d 622 (1998). Paraguay has also petitioned this Court for a writ of certiorari.

On April 3, 1998, nearly five years after Breard's conviction became final, the Republic of Paraguay instituted proceedings against the United States in the International Court of Justice (ICJ), alleging that the United States violated the Vienna Convention at the time of Breard's arrest. On April 9, the ICJ noted jurisdiction and issued an order requesting that the United States "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ." The ICJ set a briefing schedule for this matter, with oral argument likely to be held this November. Breard then filed a petition for an original writ of habeas corpus and a stay application in this Court in order

to "enforce" the ICJ's order. Paraguay filed a motion for leave to file a bill of complaint in this Court, citing this Court's original jurisdiction over cases "affecting Ambassadors . . . and Consuls." U. S. Const., Art. III, §2.

It is clear that Breard procedurally defaulted his claim, if any, under the Vienna Convention by failing to raise that claim in the state courts. Nevertheless, in their petitions for certiorari, both Breard and Paraguay contend that Breard's Vienna Convention claim may be heard in federal court because the Convention is the "supreme law of the land" and thus trumps the procedural default doctrine. Pet. for Cert. in No. 97–8214, pp. 15–18; Pet. for Cert. in No. 97–1390, p. 14, n. 8. This argument is plainly incorrect for two reasons.

First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State. See *Sun Oil Co.* v. *Wortman*, 486 U. S. 717, 723 (1988); *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U. S. 694, 700 (1988); *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court for Southern Dist. of Iowa*, 482 U. S. 522, 539 (1987). This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Article 36(2), [1970] 21 U. S. T., at 101. It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Claims not so raised are

considered defaulted. *Ibid.* By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.

Second, although treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply. We have held "that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Reid* v. *Covert*, 354 U. S. 1, 18 (1957) (plurality opinion); see also *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888) (holding that if a treaty and a federal statute conflict, "the one last in date will control the other"). The Vienna Convention—which arguably confers on an individual the right to consular assistance following arrest—has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which provides that a habeas petitioner alleging that he is held in violation of "treaties of the United States" will, as a general rule, not be afforded an evidentiary hearing if he "has failed to develop the factual basis of [the] claim in State court proceedings." 28 U. S. C. A. §§ 2254(a), (e)(2) (Supp. 1998). Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently-enacted rule, just as any claim arising under the United States Constitution would be. This rule prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him. Without a hearing, Breard cannot establish how the Consul would have advised him, how the advice of his attorneys differed from the advice the Consul could have pro-

vided, and what factors he considered in electing to reject the plea bargain that the State offered him. That limitation, Breard also argues, is not justified because his Vienna Convention claims were so novel that he could not have discovered them any earlier. Assuming that were true, such novel claims would be barred on habeas review under *Teague* v. *Lane*, 489 U. S. 288 (1989).

Even were Breard's Vienna Convention claim properly raised and proven, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial. *Arizona* v. *Fulminante*, 499 U. S. 279 (1991). In this case, no such showing could even arguably be made. Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been. Breard's asserted prejudice—that had the Vienna Convention been followed, he would have accepted the State's offer to forgo the death penalty in return for a plea of guilty—is far more speculative than the claims of prejudice courts routinely reject in those cases were an inmate alleges that his plea of guilty was infected by attorney error. See, *e.g.*, *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985).

As for Paraguay's suits (both the original action and the case coming to us on petition for certiorari), neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for violation of consular notification provisions. The Eleventh Amendment provides a separate reason why Paraguay's suit might not succeed. That Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State" was enunciated in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 329–330 (1934). Though Paraguay claims that its suit is within an exemption dealing with continuing consequences of past violations of federal rights, see *Milliken* v. *Bradley*, 433 U. S. 267 (1977), we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case.

Insofar as the Consul General seeks to base his claims on §1983, his suit is not cognizable. Section 1983 provides a cause of action to any "person within the jurisdiction" of the United States for the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws." As an initial matter, it is clear that Paraguay is not authorized to bring suit under §1983. Paraguay is not a "person" as that term is used in §1983. See *Moor* v. *County of Alameda*, 411 U. S. 693, 699 (1973); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 323–324 (1966); cf. *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989). Nor is Paraguay "within the jurisdiction" of the United States. And since the Consul General is acting only in his official capacity, he has no greater ability to proceed under §1983 than does the country he represents. Any rights that the Consul General might have by virtue of the Vienna Convention exist for the benefit of Paraguay, not for him as an individual.

It is unfortunate that this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier. Nonetheless, this Court must decide questions presented to it on the basis of law. The Executive Branch, on the other hand, in exercising its authority over foreign relations may, and in this case did, utilize diplomatic discussion with Paraguay. Last night the Secretary of State sent a letter to the Governor of Virginia requesting that he stay Breard's execution. If the Governor wishes to wait for the decision of the

ICJ, that is his prerogative. But nothing in our existing case law allows us to make that choice for him.

For the foregoing reasons, we deny the petition for an original writ of habeas corpus, the motion for leave to file a bill of complaint, the petitions for certiorari, and the accompanying stay applications filed by Breard and Paraguay.

Statement of JUSTICE SOUTER.

I agree with the Court that the lack of any reasonably arguable causal connection between the alleged treaty violations and Breard's conviction and sentence disentitle him to relief on any theory offered. Moreover, I have substantial doubts that either Paraguay or any official acting for it is a "person" within the meaning of 42 U. S. C. § 1983 and that the Vienna Convention is enforceable in any judicial proceeding now underway. For these reasons, I believe the stay requests should be denied, with the result that Paraguay's claims will be mooted. Accordingly, I have voted to deny Paraguay's and Breard's respective petitions for certiorari (Nos. 97-1390 and 97-8214), Paraguay's motion for leave to file a bill of complaint (No. 125 Orig.), Breard's application for an original writ of habeas corpus (No. 97-8660), and the associated requests for a stay of execution.

JUSTICE STEVENS, dissenting.

The Court of Appeals' decision denying petitioner's first application for a federal writ of habeas corpus became final on February 18, 1998. Under this Court's Rules, a timely petition for a writ of certiorari to review that decision could have been filed as late as May 19, 1998. See Rule 13.1 ("[A] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of

the judgment"). Ordinary review of that petition pursuant to our Rules would have given us additional time thereafter to consider its merits in the light of the response filed by the Commonwealth of Virginia. We have, however, been deprived of the normal time for considered deliberation by the Commonwealth's decision to set the date of petitioner's execution for today. There is no compelling reason for refusing to follow the procedures that we have adopted for the orderly disposition of noncapital cases. Indeed, the international aspects of this case provide an additional reason for adhering to our established Rules and procedures. I would therefore grant the applications for a stay, and I respectfully dissent from the decision to act hastily rather than with the deliberation that is appropriate in a case of this character.

JUSTICE BREYER, dissenting.

In my view, several of the issues raised here are of sufficient difficulty to warrant less speedy consideration. Breard argues, for example, that the novelty of his Vienna Convention claim is sufficient to create "cause" for his having failed to present that claim to the Virginia state courts. Pet. for Cert. in No. 97–8214, at pp. 20–22. He might add that the nature of his claim, were we to accept it, is such as to create a "watershed rule of criminal procedure," which might overcome the bar to consideration otherwise posed by *Teague* v. *Lane*, 489 U. S. 288, 311 (1989). He additionally says that what the Solicitor General describes as Virginia's violation of the Convention "prejudiced" him by isolating him at a critical moment from Consular Officials who might have advised him to try to avoid the death penalty by pleading guilty. Pet. for Cert. in No. 97–8214, at p. 22; see Brief of United States Amicus Curiae 12 ("[T]he Executive Branch has conceded that the Vienna Convention was violated"). I cannot say, without examining the record more fully, that these arguments are

obviously without merit. Nor am I willing to accept without fuller briefing and consideration the positions taken by the majority on all of the sometimes difficult issues that the majority addresses.

At the same time, the international aspects of the case have provided us with the advantage of additional briefing even in the short time available. More time would likely mean additional briefing and argument, perhaps, for example, on the potential relevance of proceedings in an international forum.

Finally, as JUSTICE STEVENS points out, Virginia is now pursuing an execution schedule that leaves less time for argument and for Court consideration than the Court's rules provide for ordinary cases. Like JUSTICE STEVENS, I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available.

For these reasons taken together I would grant the requested stay of execution and consider the petitions for certiorari in the ordinary course.

SUPREME COURT OF THE UNITED STATES

No. 97–8214 (A–732)

ANGEL FRANCISCO BREARD, PETITIONER *v.* FRED W. GREENE, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[April 14, 1998]

JUSTICE GINSBURG, dissenting.

I would grant the application for a stay of execution in order to consider in the ordinary course the instant petition, Breard's first federal petition for writ of habeas corpus.

Nos. 97-1390 (A-738) and 97-8214 (A-732)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

ANGEL FRANCISCO BREARD, PETITIONER

v.

FRED W. GREENE, WARDEN

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. In No. 97-1390, whether the Vienna Convention on Consular Relations grants a foreign country or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals, based on a past violation of Article 36(1)(b) of the Convention, requiring notification to an arrested foreign national of his right to have his country's consular representatives informed of his arrest.

2. In No. 97-1390, whether the Treaty of Friendship, Commerce, and Navigation of 1859 between the United States and Paraguayan requires United States authorities to inform Paraguayan consular officials whenever a Paraguayan national is arrested in this country; and if so, whether that Treaty grants Paraguay or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals based on a past violation of the Treaty.

3. In No. 97-8214, whether petitioner may raise, in his instant habeas corpus petition, a claim that his conviction and sentence must be set aside because of a past violation of Article 36(1)(b) of the Vienna Convention.

4. Whether, in either No. 97-1390 or No. 97-8214, petitioners are entitled to a stay of execution.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1390 (A-738)

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

No. 97-8214 (A-732)

ANGEL FRANCISCO BREARD, PETITIONER

v.

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ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. These cases principally involve questions concerning the application in domestic courts of the United States of Article 36 of the Vienna Convention on Consular Relations, April

24, 1963, 21 U.S.T. 77, 100-101. Petitioners also seek to implicate Article XII of the Treaty of Friendship, Commerce, and Navigation (FCN) between the United States and the Republic of Paraguay, Feb. 4, 1859, 12 Stat. 1092.

Article 36(1)(b) of the Vienna Convention, 21 U.S.T. at 100-101, provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State: * * *
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forward by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.] * * *

In bilateral consular conventions with several nations, the United States has agreed to the effect that "[a] consular officer [of the sending state] shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained within his district." Consular Convention, June 6, 1951, United States-United Kingdom, 3 U.S.T. 3426; see also 97-1390 Pet. App. A38-A39 (similar; consular conventions with USSR and China). Although Paraguay is not party to any such bilateral agreement with the United States, it contends that its consular officers are also entitled to mandatory notification of a Paraguayan national's arrest in the United States pursuant to

Article XII of the FCN Treaty, which provides that "[t]he diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever."

2. On August 17, 1992, Petitioner Breard was arrested by Arlington County, Virginia, police for attempted rape. Further investigation led the police to connect Breard with the earlier murder and attempted rape of Ruth Dickie in February 1992. Although Breard is a citizen and national of Paraguay, neither Arlington nor Virginia authorities advised him, at any point before his trial, of any right to have the Paraguayan consulate informed of his arrest. Nor did Arlington or Virginia authorities inform the Paraguayan consulate that Breard had been arrested. 97-1390 Pet. App. A3.

After a jury trial in the Circuit Court for Arlington County, Breard was convicted of capital murder and attempted rape and was sentenced to death. The conviction and sentence were affirmed by the Virginia Supreme Court on direct review, and this Court denied certiorari in 1994. 97-1390 Pet. App. A3-A4. Breard also pursued collateral review of his conviction and sentence in the Virginia state courts, unsuccessfully; the Virginia Supreme Court denied his petition for leave to appeal in January 1996. Id. at A4. At no point in his trial, his initial appeal, or his state collateral proceedings did Breard raise a claim that state authorities had violated the Vienna Convention

by failing to inform him of a right to have the consulate informed of his arrest. Ibid.

3. At some point after the Virginia Supreme Court's denial of review of Breard's collateral challenge to his conviction, diplomatic and consular representatives of the Republic of Paraguay became aware of Breard's conviction and sentence and sought to confer with Breard, as provided for by the Vienna Convention. Once that request was made, Virginia authorities agreed, and since that time Paraguayan officials have been granted free access to Breard, in conformity with the Convention. 97-1390 Pet. App. A4.

4. In April 1996, Breard filed a petition for a writ of habeas corpus in federal district court, contending for the first time that his conviction and sentence were invalid because of Virginia's failure to comply with the Vienna Convention. The district court held that federal review of that claim on habeas corpus was barred by Breard's procedural default in failing to raise the claim in state court. 97-8124 Pet. App. 23. The court of appeals agreed. 97-1390 Pet. App. A27-A30. The court further concluded that Breard had not shown cause that might excuse his procedural default, and in particular, that Breard had not shown that "the factual basis for his Vienna Convention claim was unavailable" at the time of his trial. Id. at A30. The court also found no potential "miscarriage of justice" to excuse the procedural default, noting that no reasonable juror could

have found that Breard was actually innocent of the crime or not eligible for the death penalty. Id. at A30-A31.

5. In September 1996, the Republic of Paraguay, the Ambassador of Paraguay, and the Paraguayan Consul General filed a complaint in federal district court, seeking a declaration that Virginia authorities had violated the Vienna Convention and the FCN Treaty with Paraguay, a declaration that Breard's conviction was void because of those alleged violations, and an injunction requiring vacatur of Breard's conviction. 97-1390 Pet. App. A55. The plaintiffs asserted two causes of actions based directly on the Convention and the FCN Treaty; the Consul General also asserted a cause of action under 42 U.S.C. 1983, based on the alleged deprivation of the Consul General's asserted right (under the FCN Treaty) to be informed of Breard's arrest and his asserted right (under the Vienna Convention) to have Breard informed of his own right to have the consular post informed of his arrest. 97-1390 Pet. App. A52-A54.

The district court dismissed the complaint for lack of subject-matter jurisdiction, based in large part on its conclusion that the action was barred by the Eleventh Amendment. The district court noted that the complaint did not allege that the state defendants continue to refuse to allow consular officials to give Breard assistance; "[n]ow that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties." 97-1390 Pet. App. A17-A18.

The court of appeals likewise held that Paraguay's action was barred by the Eleventh Amendment. The court concluded, centrally, that the action did not fall within the exception to the States' Eleventh Amendment immunity from suit for injunctions against continuing violations of federal law, recognized in Ex parte Young, 209 U.S. 123 (1908), because "the violation [of the treaties] alleged here is not an ongoing one * * * [and] the essential relief sought is not prospective." 97-1390 Pet. App. A8-A9. The court agreed with respondents that "there is no ongoing violation of Paraguay's rights * * * because Paraguay is presently on notice of Breard's situation and [Virginia] is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires." Id. at A9. The court emphasized that "the actual violation alleged is a past event that is not itself continuing," ibid., and it distinguished various cases relied on by Paraguay as involving "examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights," id. at A9-A10. By contrast, the court concluded, the relief sought in this case "is quintessentially retrospective: the voiding of a final state conviction and sentence. * * * [I]ts effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation." Id. at A11.

6. The Department of State is the agency of the federal government with lead responsibility for issues arising under the Vienna Convention, including Article 36. The Department

historically has issued periodic guidance to law enforcement officials about the requirements of consular access and notification, to further compliance with Article 36 by such officials. In addition, the State Department works with foreign consular officials and federal, state, and local law enforcement officials in the United States to address issues of non-compliance when they arise. In January 1998, the State Department issued a new publication, Consular Notification and Access, which provides comprehensive guidance on consular notification and access requirements, and in February 1998 it began distributing to law enforcement officials a pocket card setting forth the basic requirements for notification in cases of arrest and detention of foreign nationals.[1]

Some time after April 18, 1996, the United States Department of State received official notice of Breard's case through a diplomatic note of that date from the Embassy of Paraguay. That diplomatic note did not allege a breach of the Vienna Convention, but it did request the State Department's assistance in facilitating efforts to obtain information about the case from Virginia and in arranging a visit at the place of Breard's detention. Such assistance was provided. On June 4, 1996, the Department forwarded to the Governor of Virginia appeals for clemency that were received by the United States Embassy in

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[1] That brochure is the State Department's most definitive statement on how consular notification and access obligations should be honored by law enforcement officials. A copy of the brochure has been lodged with the Clerk.

Paraguay. On October 15, 1996, State Department representatives discussed the case at a meeting with representatives of Paraguay and its counsel. On December 10, 1996, the Assistant Secretary of State received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Breard.

Because of the State Department's responsibilities relating to U.S. compliance with Article 36 of the Vienna Convention, and because the Department considered it important to address Paraguay's concerns seriously in diplomatic channels, the State Department decided to undertake an investigation of the case. The Department reviewed the critical portions of the trial transcript, including Breard's testimony, and an affidavit from Breard's defense attorneys concerning their efforts on his behalf. That review persuaded the Department, critically, that Virginia authorities' failure to comply with Article 36 of the Convention prior to trial did not affect the outcome of Breard's trial or sentencing proceeding. In particular, the Department concluded that Breard had had the kinds of assistance that consular officers generally seek to ensure. The State Department came to the following specific conclusions, among others:

Breard had almost immediate and thereafter continuing contact with his family, who were involved in his defense;

Breard could not have been ignorant of American culture, as he had lived in this country since 1986 and had been married briefly to a United States citizen;

Breard had a good command of English and therefore would not have needed consular assistance in interpretation;

Breard was ably represented by criminal defense attorneys experienced in death penalty litigation, who worked closely with his family, some of whom traveled from Paraguay to assist in the defense;

Breard decided to plead not guilty and to testify at his trial contrary to the competent advice of his attorneys, who were far better able to explain the U.S. legal system to him than any consular officer would have been;

Breard's mother, who was also Paraguayan, understood that Breard's decision to plead not guilty and to testify was a strategic error and advised him not to do what he did, and so it was implausible that cultural misunderstandings accounted for his decision;

The evidence at trial demonstrated that Breard unquestionably committed the crime, and that the jury and judge could easily have imposed the death penalty even if Breard had not testified, given ample evidence that the murder was "aggravated" within the meaning of Virginia law; and

Breard had the full protection of the criminal justice system.

See App. A, infra, 33-38 (record of April 7, 1998, proceeding before International Court of Justice; United States' submission).

On July 7, 1997, after the State Department's review of the Breard case was completed, the Department reported its conclusions, including many of the above-mentioned facts, to the Paraguayan Ambassador. The Department expressed "deep regret" that Breard apparently had not been advised of his right to have consular authorities informed of his arrest and detention, as required by the Convention. The Department also advised, however, that it had found no basis for concluding that consular assistance would have altered the outcome of Breard's trial. The Department nevertheless invited Paraguay to call additional relevant information to its attention. App. A, infra, at 38; App. B, infra (correspondence between Paraguayan Ambassador and State Department). The Embassy of Paraguay neither responded officially to the Department's letter nor attempted to address the Department's analysis or conclusions.

The Department has intensified its efforts to ensure that federal, state, and local law officials in the United States are aware of and comply with the consular notification and access requirements of the Vienna Convention. The Department has issued new comprehensive guidance on the subject, which has been personally provided by the Secretary of State to the Governor of every State of the United States (a copy of that guidance has been lodged with the Clerk). This guidance and a pocket-sized reference card for law enforcement officers to carry on the street have also provided to the Attorney General of every State. The State and Justice Departments have also begun to conduct

briefings on the requirements of consular notification and access for prosecutors and law enforcement officials, focusing initially on areas with high concentrations of foreign nationals. App. A, infra, 38-39.

7. On March 30, 1998, the Government of Paraguay officially notified the United States that, unless the United States could stay Breard's execution and engage in consultations, it would file suit in the International Court of Justice (ICJ) on April 3, seeking an order that the execution be stayed. We are informed that the Department of State agreed to consultations and made a request through counsel to the Governor of Virginia, on behalf of the Secretary of State, requesting that Virginia stay Breard's execution. After consultation with the Governor, counsel for the Governor replied that Virginia was not at that time prepared to grant the Department's request, in part because of the pendency of these cases before this Court. We are informed that the State Department advised the Government of Paraguay of the Governor's response on the following morning.

On April 3, 1998, Paraguay filed an application with the International Court of Justice (ICJ), requesting a declaration from that court that the United States had violated Article 36 of the Vienna Convention by failing to inform Breard of his right to have the Paraguayan Consulate notified of his arrest, and an order directing the reestablishment of the "status quo" before that violation, including vacatur of Breard's conviction. See 97-8214 Supplemental Brief in Support of Application for a Stay

of Execution, Exh. B. Paraguay requested the ICJ to indicate provisional measures pending the outcome of the case. Ibid. On April 7, 1998, the ICJ heard oral arguments on Paraguay's request for the indication of provisional measures. On April 9, 1998, the ICJ issued an order, indicating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Id. Exh. C, ¶ 41 (ICJ order).

On April 9, 1998, the Legal Adviser to the Department of State wrote to the Governor of Virginia, bringing the order of the ICJ to his attention. The Legal Adviser requested that the Governor give consideration to the ICJ's indication of provisional measures. App. C, infra (letter from Legal Adviser to Governor). The Secretary of State is also requesting that the Governor of Virginia stay Breard's execution, in light of the ICJ's order indicating provisional measures. App. F, infra.

DISCUSSION

The United States takes very seriously both the obligations embodied in the Vienna Convention on Consular Relations and instances of violations of those obligations. In this case, the Executive Branch has conceded that the Vienna Convention was violated insofar as it required that Breard be notified that he could have the assistance of a consular officer. But the Executive Branch has also concluded that there was no affirmative interference in Breard's ability to consult with Paraguayan consular officials (his family or his attorney could have done so

at any time) and that there is no basis for concluding that the assistance of a consular officer would have changed the outcome of the criminal proceedings. It has ascertained that the essential kinds of assistance that consular notification is intended to ensure were, in fact, provided to Breard notwithstanding the failure of notification. It has also determined that the remedy Paraguay seeks is not supported by the Convention's text, its negotiation history, or the subsequent practice of state parties. In view of these considerations and the fact that a consular officer has no obligation to provide any particular level of services, the Executive Branch has concluded that Paraguay's claim as to the relevance of consular notification in Breard's case are speculative and unpersuasive, and that there is in any event no basis for requiring the undoing of the lawfully imposed sentence of the courts of Virginia. The State Department has accorded Paraguay the traditional remedy among nations for failures of consular notification: it has investigated the facts, determined that there was a breach, formally apologized on behalf of the United States, and undertaken to improve future compliance.[3]

Moreover, notwithstanding the importance of the Vienna Convention, we also believe that the Convention does not provide

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[3] The State Department is aware of no State of the United States that takes the official position that it is not required to honor the obligations of Article 36. Suggestions to the contrary by Paraguay and Breard have been considered by the Department and found to be unwarranted. The Department of State would address any evidence of deliberate noncompliance brought to its attention.

a judicial cause of action, at the behest of either a foreign national or his sending state, to have a criminal conviction or sentence vacated, either on direct appeal or on a collateral proceeding. That construction of Article 36 of the Convention by the State Department, which is responsible for its implementation, is "entitled to great weight." United States v. Stuart, 489 U.S. 353, 369 (1989). There is no indication in the text or negotiating history of the Convention, or in its implementation by contracting states, that a violation of Article 36 could vitiate an otherwise valid conviction, and such a result would be inconsistent with the inherently discretionary nature of consular relations. Furthermore, this Court has never addressed whether any remedy should be available in a criminal case for a violation of Article 36, and it would be inappropriate for this Court to decide that issue for the first time in the context of a collateral habeas corpus proceeding, especially where the issue was not raised at trial or the initial appeal. This Court should therefore deny the certiorari petitions as well as petitioners' related motions for relief under the Court's original jurisdiction.

I. NEITHER PARAGUAY NOR ITS OFFICIAL REPRESENTATIVES HAVE A CAUSE OF ACTION THAT WOULD AFFORD A JUDICIAL REMEDY IN DOMESTIC COURTS OF VACATUR OF A CRIMINAL CONVICTION OF A PARAGUAYAN NATIONAL

A. Paraguay May Not Proceed Under the Vienna Convention

1. a. Although the court of appeals disposed of Paraguay's action on Eleventh Amendment grounds, the United States' principal concern here is with the Convention itself. Specifically, the important question for the United States is whether the Convention provides a judicial cause of action or remedy in domestic courts, at the behest of a sending state or its representatives, to obtain the vacatur of a conviction on the basis of the past failure of authorities to inform an arrested national of the sending state of his right to have his consular representative informed of his arrest. That question must be distinguished from the entirely different question whether a sending state such as Paraguay (or an arrested foreign national) might have recourse to the courts for an order directing cessation of an ongoing refusal of authorities to allow consular notification or access, as guaranteed by the Convention.[3] Thus, while we do not necessarily endorse the court of appeals' distinction between "past" and "ongoing" violations of the Convention for Eleventh Amendment purposes in this setting, we do

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[3] This case also does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention. See United States v. Arlington County, 669 F.2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982).

agree that Paraguay and its representatives were properly denied the judicial relief that they seek.

In answering that question with respect to Paraguay's suit, we start from the presumption, articulated by this Court in The Head Money Cases, 112 U.S. 580 (1884), that "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress." Id. at 598; see also Charlton v. Kelly, 229 U.S. 447, 474 (1913); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided."). This Court has consistently stated that the power to determine whether the United States has, or has not, acted in accordance with a treaty's obligations to a foreign nation "ha[s] not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws." Whitney v. Robertson, 124 U.S. 190, 194-195 (1888).

These considerations are the appropriate ones in the circumstances of this case, where the United States has addressed

Paraguay's concerns in diplomatic channels. It is not unusual for a treaty to "only set forth substantive rules of conduct * * * [and] not create private rights of action * * * [that would permit suit] in United States courts." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989). While in some circumstances parties to a treaty may intend that there be judicial enforcement of its provisions, such judicial remedies are generally reserved for treaties "which are capable of enforcement as between private parties in the courts of the country," Head Money Cases, 112 U.S. at 598, and not when one nation challenges the governmental conduct of another. Thus, for example, treaties "which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance" may be invoked by aliens in domestic courts as controlling law. Ibid.

This case, however, involves a claim by a foreign government that a State of the United States should be prevented by domestic courts from carrying out its sovereign authority to enforce the sentencing judgment of its criminal courts, notwithstanding the view of the Executive Branch that such a remedy is unwarranted. Such a claim is extraordinary, and could be recognized only if there were clear evidence that the parties to the Vienna Convention had intended such a judicial remedy to be available.[4]

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[4] It is important to distinguish the question whether the Vienna Convention creates a judicial remedy for Paraguay from the question whether the Convention is "self-executing." The United States agrees that the Vienna Convention is self-executing, in

(continued...)

b. (i) In construing a treaty, as in construing a statute, the Court looks first to its terms to determine its content. United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992). Nothing in the text of the Convention provides that past violations of Article 36 are to be remedied through judicial actions by sending states or their nationals to vacate criminal convictions. Article 36(1)(b) does state that arresting authorities are to inform an arrested foreign national of "his rights" to have a consular post informed of his arrest or detention, but this case does not involve an attempt to enforce those rights presently; neither Paraguay nor Breard is seeking to

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[4](...continued)
the sense that it can be implemented by government officials without implementing legislation. That issue is distinct from the question whether the Convention creates enforceable rights that may be raised and adjudicated in a particular judicial setting. See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298-1299 (3d Cir. 1979); Dreyfus v. Von Finck, 534 F.2d 24, 29-30; United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985). Further, in this case, there is an important distinction between the availability of a cause of action to obtain consular notification (or to prevent ongoing interference with the right to obtain such notification) and the existence a cause of action to vacate a criminal conviction and sentence based on a prior failure of consular notification. See generally Restatement (Third) of the Foreign Relations Law of the United States § 111, cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); id. § 907, cmt. a ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies."); C. Vasquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695, 719-722 (1995) (right of action question "is analytically distinct from the 'self-execution' concept").

have the Paraguayan consulate informed of his arrest.[3] Similarly, although Article 36(1)(c) states that consular officers "shall have the right to visit a national of the sending State who is in prison," no current interference with that right is at issue here, for Virginia has afforded Paraguayan officials access to Breard. Article 36(2) further states: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." As we have just explained, however, enforcement of "the rights accorded under this Article" (Article 36) is not the object of this litigation.

(ii) The negotiating history of the Convention also gives no indication that the contracting parties intended that the Convention itself would mandate that a failure of consular notification would affect the validity of a criminal conviction or would permit a sending state to obtain an injunction against the execution of a criminal sentence in a receiving state. Cf. Alvarez-Machain, 504 U.S. at 665 (considering negotiating history of U.S.-Mexico extradition treaty). The initial draft of Article 36 was based on a proposal of the International Law Commission,

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[3] It is also noteworthy that the parties to the Convention expressly "realiz[ed] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79.

which would have required that countries automatically notify the relevant consulate whenever an alien was arrested. Several delegations (including the United States delegation) opposed that requirement, emphasizing that mandatory notification in all cases would impose an obligation beyond the capacity of many receiving countries to fulfill, given the large number of aliens residing in or visiting those countries, and that mandatory notification might be contrary to the wishes of some arrested persons, who might not want their consular post to be informed of their arrest. App. D, infra (Volume I, Official Records, United Nations Conference on Consular Relations, Vienna, 4 March--22 April 1963) at 336-337. Other delegates, however, felt that, to protect the consular function, consular authorities should always be informed of their nationals' arrests, without the need for an express invocation of the right to such notification by the arrested national. Originally, proposals to make consular notification dependent on a request by the arrested person were rejected. Id. at 342. A month later, however, the Conference reconsidered Article 36, and accepted both a 17-power amendment to make notification of the consular post dependent on the request of the arrested individual, and an amendment submitted by the United Kingdom requiring that an arrested alien be informed of his right to have consular notification made. Id. at 82-87.

The Vienna Conference was well aware that aliens might frequently find themselves subject to other countries' criminal processes, especially in countries "which had large numbers of

resident aliens or which received many tourists and visitors." App. D, infra, at 82, ¶ 62 (Egyptian delegate). In light of the potential burden of consular notification on receiving countries, the compromise eventually adopted was intended to ensure "that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other circumstances, there was a failure to report the arrest of a national of the sending State." Ibid. Given the concerns expressed about burdens on receiving countries, it is difficult to believe that the Conference would have accepted a proposal that would have led to invalidation of criminal convictions. And, in fact, no such proposal was advanced, much less adopted.[4]

(iii) The practice of other contracting states in implementing the Convention also gives no indication that a violation of Article 36 may be remedied through judicial vacatur of a conviction. Cf. Alvarez-Machain, 504 U.S. at 665. Throughout the two-year period in which the Department of State and the Embassy of Paraguay have been discussing Breard's case, Paraguay has failed to identify a single country that would grant the remedy that Paraguay seeks from the United States courts. Moreover, when Breard's case came to the attention of the State Department, the Department made inquiries to all United States

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[4] Indeed, some delegates objected even to the adopted compromise on the ground that "[t]he convention was concerned with consular privileges and immunities and not with national laws," and that "[n]o receiving State could admit interference in its internal judicial affairs." App. D, infra, at 84, ¶ 81 (Romanian delegate).

embassies worldwide, and through them, to foreign countries, as to the availability of remedies for the failure of governments to comply with Article 36. Although the results of that survey remain incomplete, the survey also did not reveal a single instance in which a foreign country had provided a status quo ante remedy of vacating a criminal conviction for a failure of consular notification (at the behest of either the arrested foreign national or his government). See App. A, infra, at 32. Our legal research has revealed only one case abroad in which that claim was even considered, and it was rejected on the grounds that, under the Convention, consular authorities had only a "complementary and subsidiary" power to assist the accused in obtaining legal counsel, and that the accused in that case had legal counsel (which is also true of Breard). See App. E, infra (excerpt and discussion of Re Yater, 77 I.L.R. 541-542 (Italy, Court of Cassation 1973)).

(iv) Finally, the absence of any judicially enforceable remedy of vacatur is not surprising given the nature of the interests at stake. The Convention does not make consular assistance essential to the host country's criminal justice system, and there is no reason why criminal proceedings cannot continue without the presence of a consular officer. Consular officers do not act as attorneys for their nationals in the United States, nor do American consular officers act as attorneys for United States citizens in foreign courts. Moreover, consular officers have broad discretion to determine how they will

discharge their function, once they are informed of a national's arrest; they may do nothing at all, or they may simply see to it that the arrested national has competent counsel (which Breard had) and contact with his family (which Breard also had). It would be wrong automatically to vacate a criminal conviction based on a lack of consular notification, given that such notification might have resulted in no essential (or even significant) consular assistance at all. And there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers. Furthermore, compliance with Article 36 varies widely worldwide, and violations of the obligation to inform arrested nationals of their right to consular notification are perhaps inevitable, given the large numbers of persons who reside in and visit countries other than their own. It is difficult to believe that the contracting parties to the Vienna Convention would have agreed to Article 36 if they had anticipated that lapses in adherence to the notification requirement would vitiate the results of their domestic criminal justice systems.

2. Paraguay has relied on Santovincenzo v. Egan, 284 U.S. 30 (1931), Wildenhus's Case, 120 U.S. 1 (1887), and Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794), for the proposition that a foreign consul may seek enforcement of his rights in the courts of the United States (97-1390 Pet. 8 n.1). Those decisions,

however, do not support the proposition that Paraguay has a judicially enforceable remedy under the Vienna Convention to vacatur of a criminal conviction or sentence.

In Santovincenzo, the Court held that the Consul General of Italy was entitled, by operation of a bilateral treaty with the United States, to take possession of the assets of an Italian national, domiciled in the United States, who had died in New York intestate and without identified heirs. The question in that case was not whether the treaty provided the Italian Consul with a right of access to the courts, for under New York law, the decedent's estate was submitted to the courts for administration as a matter of course, pursuant to established state law procedures. The Italian Consul appeared in court as would any private party claiming a distribution from the estate, and such distributions were inherently likely to occur in probate court. The only issue to be decided in Santovincenzo was whether the treaty had given Italy a particular substantive right. See id. at 34-38.

In The Sloop Betsey, the Court rejected the contention, made by a French privateer who had captured a Swedish ship and brought it to Baltimore as prize, that the district court lacked admiralty jurisdiction to determine rights in the ship because exclusive jurisdiction (it was contended) lay only with French authorities. See 3 U.S. (3 Dall.) at 8-9 (argument of counsel). The Court, sua sponte, inquired of the parties whether French consuls in the United States might exercise prize jurisdiction

over captured ships brought here by French parties, in the absence of a treaty expressly providing for such jurisdiction, and answered that question in the negative. Id. at 15-16. The Court did not suggest that a French consul might invoke the jurisdiction of the federal courts in the first instance to have that question answered. The case was initiated in district court by a private libellant, pursuant to the customary manner of invoking admiralty jurisdiction by private parties. Id. at 6 (statement of case).

In Wildenhus's Case, the Court concluded that the Belgian Consul might rely on federal statutory provisions governing the writ of habeas corpus to vindicate his asserted right, under a bilateral convention with the United States, to exclusive jurisdiction over merchant seamen. 120 U.S. at 17. That convention and similar ones, however, were intended to curtail domestic criminal jurisdiction over aliens in certain circumstances. Id. at 14-16. Thus, although Belgium's substantive argument was ultimately rejected in that case, it was not difficult to conclude that the treaty provided the Belgian Consul with a judicial remedy to prevent New Jersey's allegedly unlawful interference with his exclusive jurisdiction and usurpation of jurisdiction over his charges. Nothing in the Vienna Convention confers a corresponding right on the consul of a foreign nation to obtain custody of one of its nationals who is detained by authorities in the receiving state; to the contrary,

the Convention plainly contemplates that the alien will remain in the custody of domestic authorities, in accordance with its laws.

Accordingly, no decision of this Court suggests that consular officials may sue in our domestic courts for a remedy for a past violation of rights afforded to consuls under a treaty, much less for vacatur of a criminal conviction. Whereas Santovincenzo and Wildenhus's Case did recognize, in certain circumstances, the possibility that consuls would be able to present their interests, secured by treaties, in courts, both of those cases involved treaties that were inherently directed at judicial proceedings (in Santovincenzo, probate proceedings, and in Wildenhus's Case, local criminal jurisdiction). The Vienna Convention does not have a similar focus on judicial proceedings and cannot reasonably be read to grant foreign consuls a cause of action in domestic courts.

3. The decision below does not conflict with any decision of any federal court of appeals or any state court of last resort. The only other federal appellate court that has addressed whether a foreign country may obtain judicial redress for a past violation of Article 36 has, like the court of appeals in this case, found such a claim to barred by the Eleventh Amendment. United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), petition for cert. pending, No. 97-1365 (filed Feb. 18, 1998).

Paraguay has pointed to Republic of Argentina v. City of New York, 25 N.Y.2d 252 (1969), in which the New York Court of

Appeals held that, as a matter of customary international law, premises owned by a foreign country and devoted to consular purposes are exempt from municipal real property taxes.[5] That case, like Santovincenzo, did not require the recognition of an affirmative cause of action in U.S. courts at the behest of a foreign country, because Argentina invoked the generally applicable forms of action available under state law to entities seeking a declaration of tax immunity. See id. at 256. Thus, Argentina was in a position no different from, for example, a charitable institution contending that its property was immune from tax under domestic law. Indeed, the New York Court of Appeals denied Argentina's request for a refund of taxes paid in the past, because it had failed to comply with the generally applicable provisions of the City's Administrative Code for such refunds. Id. at 265.

4. In sum, although Article 36 of the Vienna Convention is unquestionably of great significance to the United States government, we believe that review is not warranted of Paraguay's contention that the Vienna Convention provides it with a cause of action by which it may obtain a judicially enforceable remedy in U.S. courts -- and here, the extraordinary remedy of setting aside a criminal conviction and sentence or enjoining execution of that sentence -- for a past violation of Article 36 with respect to one of its nationals. It is most implausible that the

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[5] At the time of the decision in that case, the Senate had not yet ratified the Vienna Convention, which expressly makes consular premises exempt from municipal taxes. 25 N.Y.2d at 260.

contracting parties to the Convention intended such a remedy, and it is therefore not surprising that the decision below is not contrary to any decision of this Court, any federal court of appeals, any state supreme court, or (as far as we are aware) the court of any foreign nation.

B. Paraguay May Not Proceed Under The Treaty Of Friendship, Commerce, and Navigation

Paraguay also contends that Virginia authorities violated Article XII of the February 4, 1859, Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, 12 Stat. 1092 (FCN Treaty), when they failed to inform the Paraguayan consular post that Breard had been arrested. Article XII states that the "consuls of the Republic of Paraguay in the United States of American shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any nation whatever." Ibid. Although that article does not explicitly refer to consular notification, Paraguay contends that, under Article XII's most-favored-nation clause, its consuls enjoy the right to be informed of the arrest of any Paraguayan national in the United States, because a similar right has been extended by the United States to other nations' consuls in bilateral consular conventions. See 97-1390 Pet. App. A37-A39 (consular conventions between U.S. and United Kingdom, USSR, and China).

Paraguay's argument fails on the merits. First, Article XII's reference to consular "privileges, exemptions, and immunities" does not encompass consular notification when

nationals are detained, but rather is intended to ensure that the United States does not impede the performance of official consular duties through judicial process or taxation. Thus, for consular officers, "privileges, exemptions, and immunities" extended by treaty clauses have traditionally included the inviolability of consular premises and archives, immunity from civil and criminal jurisdiction for official acts, and duty-free import and export of personal property. By contrast, the United States has traditionally limited mandatory consular notification to cases where alien detainees are nationals of a country with whom the United States has a bilateral agreement specifically requiring such notification. That practice is consistent with the position taken by the United States delegate at the Vienna Conference, where that delegate suggested that consular notification should be at the election of the alien detainee rather than automatic, because some aliens might not want their consular posts to be notified of their arrest.

Second, longstanding international practice has been to require countries claiming such "conditional" most-favored-nation benefits to trigger the process by sending a diplomatic note requesting the specific treatment given to a third nation and undertaking to accord reciprocal treatment to the United States. See F. McDowell, Digest of United States Practice in International Law 256 (1975). We have been informed by the Department of State that Paraguay has made no such request.

Thus, Paraguay cannot claim the most-favored-nation right allegedly at issue here.

Even if Paraguay's argument were correct on the merits, Paraguay nonetheless would not have a judicially enforceable cause of action to vacate Breard's conviction. As with the Vienna Convention, the text of the FCN Treaty gives no indication that the contracting parties intended it to provide judicially enforceable remedies for past violations as might be relevant here, and the same is true of various other consular conventions relied on by Paraguay requiring consular notification. Nor are we aware of any negotiating history to the FCN Treaty or other consular conventions or subsequent state practice that would suggest the availability of a judicial cause of action to remedy a past violation of a foreign country's right to consular notification.

C. Paraguay's Consul General May Not Proceed Under 42 U.S.C. 1983

There remains the question whether Paraguay's Consul General in the United States has a cause of action against Virginia authorities under 42 U.S.C. 1983 to remedy their violation of his asserted right to be informed of Breard's arrest, and his asserted right that Breard be advised of his own right to have the consular post notified of the arrest. That claim cannot be sustained. As an initial matter, it is clear that Paraguay itself could not proceed under Section 1983. Section 1983 protects the "rights" of "any citizen of the United States or other person within the jurisdiction thereof" from deprivation

under color of state law. Whereas a foreign country can be a "person" within the meaning of some federal statutes using that term, see Pfizer, Inc. v. India, 434 U.S. 308, 315-318 (1978) (India is a "person" within the coverage of the Sherman and Clayton Acts), Section 1983 was not intended to include sovereigns within its reach. Section 1983 was enacted to allow the enforcement by "private parties" of their civil rights against governmental actors, see Moor v. County of Alameda, 411 U.S. 693, 699 (1973), but political entities have no such civil rights. See South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966) ("person[s]" protected by the Due Process Clause of the Fifth Amendment do not include States); cf. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (State not a "person" that may be sued under Section 1983). And foreign countries like Paraguay are further excluded by the plain language of Section 1983 because they are not "within the jurisdiction of the United States." Therefore, the Convention does not extend to Paraguay any "rights" enforceable against the state respondents with respect to Breard's conviction by an action brought under Section 1983.

Consul General Gonzalez, acting in his official capacity, has no greater ability to proceed under Section 1983 than does the country he represents. Any rights the Consul General might have by virtue of the Vienna Convention or the FCN Treaty exist for the benefit of Paraguay, not for him as an individual. Thus, the Consul General has not sued because he has been deprived of

any rights he holds as a person, but only because the government of Paraguay is said to have certain treaty rights (such as gaining access to detained nationals), and he is the official agent of Paraguay authorized to exercise those rights. See 97-1390 Pet. App. A43 (noting that plaintiffs Ambassador and Consul General "bring this action in their official capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay"). If Consul General Gonzalez were no longer the Paraguayan consul, he would have no access rights to Breard; his successor in office would have those rights, and indeed, the action under Section 1983 was brought by his predecessor in office, former Consul General Jose Antonio Dos Santos. See 97-1390 Pet. App. A43.

Moreover, like Paraguay, its official representative the Consul General is not a person "within the jurisdiction of the United States" who may bring suit under Section 1983. Consular officers have in all cases immunity for their official acts, and full diplomatic immunity when they are assigned to embassies. United States v. Wong Kim Ark, 169 U.S. 649, 678-691 (1898), is not to the contrary. Wong Kim Ark concerned the citizenship of a child born to alien parents (not a consul) in the United States. In the course of its lengthy discussion of past precedents, the Court explained that "consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his intercourse with foreign

States or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside." Id. at 678-679. Insofar as that statement in Wong Kim Ark suggested that consuls may be prosecuted for their violations of domestic law (absent a treaty or other source of international law to the contrary), it is unexceptionable, but it is beside the point here. A consul may be "within the jurisdiction of the United States" in his individual capacity, but not his official capacity. Thus, if a consul were personally subject to arbitrary arrest by a state officer, he might be able to proceed on a Fourth Amendment claim under Section 1983; but he cannot use Section 1983 to vindicate the sovereign interests of the country he represents.

D. Considerations About This Court's Original Jurisdiction

Paraguay has suggested that a factor militating in favor of certiorari is that its petition falls within the Court's nonexclusive original jurisdiction as a "Case[] affecting Ambassadors, other public Ministers and Consuls." U.S. Const. art. III, § 2, cl. 2. Paraguay suggests that the Court should "presumptively" review cases within its original jurisdiction that arrive in the Court on petition for a writ of certiorari. 97-1390 Pet. 23. That submission is without merit.

First, although Consul General Gonzalez might be able, in some circumstances, to invoke the Court's original jurisdiction,

it is far from clear that the Court would have original jurisdiction over Paraguay's own asserted causes of action. Section 1651(b)(1) of Title 28 states: "[T]he Supreme Court shall have original but not exclusive jurisdiction of * * * [a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." That language does not include actions involving foreign nations themselves as parties. The language of Article III, Section 2, Clause 2, creating original jurisdiction over cases "affecting * * * Consuls," might be read more broadly than the statutory language (which focuses on the parties to the case rather than whom the case "affect[s]"). Nevertheless, the petition in No. 97-1390, which is in essence an action brought by Paraguay itself to have the conviction of one of its nationals set aside, rather than to protect the right of its consul as such, does not appear to be within the core of the Court's original jurisdiction, if within it at all.

Second, contrary to Paraguay's contention (Pet. 24), Article III does not indicate an intent by the Framers that any case involving the United States' treaty obligations to foreign sovereigns should presumptively be heard by this Court. The extension of federal judicial power in Article III, Section 2, Clause 1 to "all cases affecting Ambassadors, other public Ministers and Consuls" was likely intended for the principal purpose of ensuring that controversies potentially affecting the inviolability of ambassadors, foreign ministers, and consuls,

would be heard by the federal courts, which would give due consideration to the sovereign interests of the foreign country that were at stake. "It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits against the representatives of such foreign governments." Davis v. Packard, 32 U.S. (7 Pet.) 276, 284 (1833) (emphasis added); see also Valario v. Thompson, 7 N.Y. 576, 580 (1853) (Act of Congress providing exclusive federal jurisdiction over cases to which consuls are parties "prescribes the tribunal in which a consul in this country is to be called on to answer"). The Framers did not, however, vest original jurisdiction in this Court for cases affecting foreign nations, or cases involving treaty interpretation. And Congress, by giving the district courts concurrent jurisdiction over cases to which consuls are parties, as with other federal-question cases, has concluded that as a general matter, the lower courts may dispose of cases affecting consuls, subject to this Court's exercise of its certiorari jurisdiction under its usual standards.

Third, this Court has never stated that it presumptively reviews, by certiorari, cases that would fall within its original jurisdiction. To the contrary, the Court has declined original jurisdiction over many cases precisely because those cases could be adequately handled by the lower courts. A crucial factor affecting the Court's decision to exercise its nonexclusive original jurisdiction is "whether recourse to that jurisdiction *

* * is necessary for the [invoking party's] protection." Washington v. General Motors Corp., 406 U.S. 109, 113 (1972). In the absence of a showing that an inferior court could not afford adequate relief, "the availability of the federal district court as an alternative forum * * * suggest[s] that [the Court] remit the parties to the resolution of their controversies in the customary forum." Id. at 114; see also United States v. Nevada, 412 U.S. 534, 538 (1973) (per curiam) ("We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim."). Eleventh Amendment considerations aside, there is no doubt that the lower federal courts would have had adequate means to provide redress to Paraguay, had Paraguay presented a meritorious case. Thus, the mere fact that Consul General Gonzalez might theoretically have been able to invoke the original jurisdiction of this Court is not a compelling reason for the Court to grant certiorari on Paraguay's petition.

II. PETITIONER BREARD MAY NOT, IN HIS HABEAS CORPUS PETITION, SEEK TO INVALIDATE HIS CONVICTION AND SENTENCE BECAUSE OF A PAST VIOLATION OF THE VIENNA CONVENTION.

Petitioner Breard contends (97-8214 Pet. 15-23) that he is entitled to have his capital murder conviction and death sentence vacated because of the failure of Virginia authorities to apprise him following his arrest of the right of consular notification under Article 36(1) of the Vienna Convention. There are, however, insurmountable obstacles to Breard's ability to raise that contention in a petition for a writ of habeas corpus (whether in his petition filed originally in district court or his petition for an original writ filed in this Court). The court of appeals ruled that Breard's effort to raise that claim was barred by his procedural default in having failed to raise it at trial or on direct appeal. That ruling was correct, is not in conflict with any decision of this Court or any other court of appeals, and represents a straightforward application of well-settled principles governing the writ of habeas corpus.

Moreover, for essentially the same reasons as those set forth in our discussion of the Vienna Convention -- especially the preamble to the Convention, which expresses the contracting parties' "realiz[ation] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States," 21 U.S.T. at 79 -- we do not believe that Breard could obtain relief from his conviction and sentence because of a violation of the Vienna Convention even on direct

appeal. The Court need not reach that question in this case, however, for it is clear that a remedy for a violation of Article 36 is not available here on habeas corpus.

A. Breard concedes (97-8214 Pet. 3) that his counsel failed to raise any claim based on an alleged violation of the Vienna Convention at trial, on direct appeal, or in the state habeas proceedings. Under this Court's well settled habeas jurisprudence, Breard's consular notification claim is procedurally defaulted and is not cognizable on federal habeas corpus in the absence of an affirmative demonstration of cause and prejudice. See Gray v. Netherland, 116 S. Ct. 2074, 2080-2081 (1996); Coleman v. Thompson, 501 U.S. 722, 729-731 (1991). In comparable circumstances, this Court has recently denied a certiorari petition and a stay request in other cases in which state prisoners have sought to litigate defaulted consular notification claims. See Murphy v. Netherland, 118 S. Ct. 26 (1997); In re Montoya, 117 S. Ct. 2476 (1997). There is no reason for a different result here.

Seeking to avoid the consequences of his failure to raise the consular notification claim in a timely fashion, Breard argues that the Vienna Convention became the "supreme law of the land" upon its proclamation by the President after advice and consent by the Senate, and therefore the judicially created doctrines of procedural default that ordinarily apply in domestic litigation are necessarily inapplicable when a violation of the Convention's consular notification provisions is alleged as a

ground for relief in a criminal case. Nothing in the language of the Vienna Convention or in its negotiating history, however, suggests that United States courts may not insist that claims based on alleged violations of the Convention -- to the extent that they are cognizable at all when asserted by a criminal defendant -- be raised in a timely fashion.

Indeed, Article 36(2) expressly provides that the consular notification rights identified in Article 36(1)(b) "shall be exercised in conformity with the laws and regulations of the receiving [nation]," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this [A]rticle are intended." The procedural requirements for orderly presentation of claims and objections to a trial court of criminal jurisdiction are surely valid "laws and regulations" of the United States with which any claim of a failure of consular notification must comply. Application of procedural default rules for failure to comply with those requirements does not interfere with the purposes of consular notification; in fact, by requiring the prompt presentation of claims of violations of Article 36, procedural default rules ensure that any violations of Article 36 will be swiftly brought to the attention of authorities and then resolved.

Without doubt, "Treaties made * * * under the Authority of the United States[] shall be the Supreme Law of the Land." U.S. Const., Art. VI, cl. 2. That is no less true of the Constitution

itself, however, and yet this Court has routinely applied its procedural default jurisprudence to bar consideration in habeas corpus proceedings of claims based on alleged violations of constitutional provisions. See, e.g., Gray v. Netherland, 116 S. Ct. at 2080-2081 (1996) (due process Brady claim barred by procedural default); United States v. Frady, 456 U.S. 152, 167-168 (1982) (claim that defective jury instruction unconstitutionally relieved the government of its burden of proving an element of the offense barred by procedural default). The Court has also recognized the applicability of procedural default rules to alleged Miranda violations, to which Breard analogizes (97-8214 Pet. 6) the consular notification provisions at issue here. See Ylst v. Nunnemaker, 501 U.S. 797 (1991); see also Wainwright v. Sykes, 434 U.S. 72, 87-88 (1977) (procedural default rules applicable to voluntariness claims). There is no basis for a conclusion that a claim based on a treaty provision may not be procedurally defaulted, even though claims based upon alleged violations of specific constitutional provisions are routinely subject to the operation of procedural default rules.

Furthermore, treaty provisions, when they give rise to judicially cognizable rights, are regarded "as equivalent to an act of the legislature." Foster v. Neilson, 27 U.S. (2 Pet.) at 314. This Court has noted that "the established rule with respect to nonconstitutional [i.e., statutory] claims" is that they are cognizable on habeas only if thealleged error "constituted a fundamental defect which inherently results in a

complete miscarriage of justice." Reed v. Farley, 512 U.S. 339, 354 (1994) (internal quotation marks omitted). As we discuss further below, Breard has not shown a miscarriage of justice in his case; accordingly, it is doubtful his treaty claim is cognizable on habeas at all.

B. Breard contends (97-8214 Pet. 20-23) that his procedural default should be excused. A procedurally defaulted claim such as Breard's is reviewable on federal habeas only if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. at 750. Breard claims he had cause for not earlier raising a claim based on a Vienna Convention treaty provision that has continuously been in effect since 1969 because the claim "was so novel that its legal basis was not reasonably available" until a reported Fifth Circuit opinion in 1996. 97-8214 Pet. 20-21 (citing Faulder v. Johnson, 81 F.3d 515 (5th Cir.), cert. denied, 117 S. Ct. 487 (1996)). Cause for a procedural default may be found "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of the state proceedings. Reed v. Ross, 468 U.S. 1, 16 (1984). The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the

claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986).[6]

Breard's argument based on the novelty of his claim, however, indicates that his claim is a "new rule" not cognizable on habeas under Teague v. Lane, 489 U.S. 288 (1989). Teague holds that a procedural rule is "new" and generally unavailable on habeas unless "a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." Lambrix v. Singletary, 117 S. Ct. 1517, 1524 (1997) (punctuation omitted). Accord O'Dell v. Netherland, 116 S. Ct. 1969, 1574-1576 (1996); Goeke v. Branch, 115 S. Ct. 1257 (1995) (per curiam); Caspari v. Bohlen, 510 U.S. 383 (1994); Graham v. Collins, 506 U.S. 461 (1993). The courts of appeals have agreed that a claim so novel as to provide cause under Reed is also a new rule that cannot be raised on habeas under Teague. See Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.)

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[6] In our view, Breard cannot satisfy this standard because (as the court of appeals noted) the Convention has been in effect since 1969, is published at 21 U.S.T. 77, has been mentioned in several reported decisions, and therefore would have been found upon a reasonably diligent search by competent counsel. See also Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir.) (collecting Vienna Convention cases), cert. denied, 118 S. Ct. 26 (1997). Breard contends, however (97-8214 Pet. 22), that state officials "ignored their legal duty" under the Vienna Convention and thereby "effectively 'concealed'" the treaty from defense counsel. This case bears no resemblance to Amadeo v. Zant, 486 U.S. 214, 224 (1988), where state authorities concealed a "handwritten, unsigned, unstamped, and undesignated" memorandum that was not "intended for public consumption." Here, unlike in Amadeo, the provision upon which petitioner relies has been on the public books for more than a quarter-century.

(en banc) ("Any claim sufficiently novel that it was unavailable during the state proceedings must be a 'new rule' under Teague"), cert. denied, 510 U.S. 899 (1993); Selvage v. Collins, 975 F.2d 131, 136 (5th Cir.) ("[A] rule found novel for cause purposes will not be available in a federal habeas proceeding, and * * * a determination that a rule will be applied precludes a finding that the claim's novelty constitutes cause"), cert. denied, 508 U.S. 952 (1993); Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) ("[A] holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, must also mean that the claim was too novel to be dictated by past precedent"), cert. denied, 497 U.S. 1010 (1990).

This Court has never decided whether there should be any remedy in a criminal case for a violation of Article 36, and it would be inappropriate to decide that issue for the first time on habeas corpus. The Court has emphasized that the availability of habeas corpus "serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established [federal] standards." Teague, 489 U.S. at 306 (emphasis added; internal quotation marks omitted). But in this and other criminal proceedings involving foreign nationals, courts have conducted their proceedings in reliance on the present state of the law, which does not dictate any remedy for a violation of Article 36. "The interest in leaving concluded litigation in a state of

repose, that is, reducing the controversy to a final judgment not subject to further judicial revision," ibid., counsels against recognition of a substantial and dramatic new rule of criminal procedure based on the Vienna Convention (such as suppression of evidence or, as petitioner evidently requests, complete vitiation of the criminal trial) in a collateral proceeding.[7]

Nor could Breard's consular notification claim, if judicially recognized as a basis for vacating an otherwise valid and final criminal conviction and sentence, qualify for retroactive application on habeas corpus under Teague's exception for newly declared "watershed" legal rules. Although "the precise contours of this exception may be difficult to discern," Saffle v. Parks, 494 U.S. 484, 495 (1990), the Court stated that (1) a qualifying procedural rule "must not only improve accuracy, but [must] alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis and internal quotation marks omitted); (2) the right of the accused to counsel in all criminal prosecutions for serious criminal offenses represents "the paradigmatic example" of a "watershed" procedural rule under

[7] Breard does not argue, and clearly cannot show, that holding him to his procedural default would constitute a miscarriage of justice. The court of appeals noted that petitioner Breard is not "actually innocent of the offense he committed or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty." 97-1390 Pet. App. A30-A31. To the contrary, his guilt was established not only by overwhelming forensic evidence, including DNA matching, but also by his highly inculpatory testimony at both the guilt and penalty phases of his trial.

Teague's exception (Gray v. Netherland, 116 Ct. at 2085; Saffle v. Parks, 494 U.S. at 495)); and (3) occasions for invoking the Teague exception will be necessarily rare, as it is "unlikely that many such components of basic due process have yet to emerge" (Teague, 489 U.S. at 243).

Article 36(1)'s consular notification provisions do not constitute a basic component of due process, comparable to an accused's right to be represented by counsel. While post-arrest consular notification may aid a detained foreign national in arranging for counsel and in otherwise pursuing his defense against criminal charges, Breard, like all defendants charged in federal or state courts with serious charges, was constitutionally entitled to the assistance of counsel, and in fact appointed, competent counsel was furnished to him in this case.

C. Breard has also filed a petition for an original writ of habeas corpus in this Court. That petition does not provide any basis for overlooking his procedural default. In Felker v. Turpin, 116 S. Ct. 2333 (1996), this Court noted that its "authority to grant [original] habeas relief to state prisoners is limited by [28 U.S.C.] 2254, which specifies the conditions under which such relief may be granted to a person in custody pursuant to the judgment of a State court." Id. at 2339 (internal quotation marks omitted). The procedural default rules governing the availability of habeas corpus in the lower courts under Section 2254 (and in this Court on certiorari review

therefrom) should also "inform [this Court's] authority to grant such relief as well" on a petition for an original writ. Ibid. Breard's claim based on the Vienna Convention presented on his petition for an original writ of habeas corpus should therefore be deemed barred by his procedural default.

III. NOTWITHSTANDING THE RECENT ORDER OF THE INTERNATIONAL COURT OF JUSTICE, PETITIONERS HAVE NOT SHOWN THAT A JUDICIAL STAY OF EXECUTION IS WARRANTED

A. The International Court of Justice (ICJ) has, upon an application by Paraguay against the United States, indicated provisional measures that ought to be taken, to the effect that "[t]he United States should take all measures at its disposal" to ensure that Breard is not executed pending the ICJ's final decision. The Executive Branch, on behalf of the United States, takes the order recently entered by the ICJ very seriously, even though the United States argued against that court's jurisdiction and against the indication of provisional measures. Accordingly, in response to the ICJ's order, the Secretary of State is today requesting that the Governor of Virginia stay Breard's execution. See App. F, infra.

What the Executive Branch of the federal government may or should do in response to the ICJ's order, however, is a different question from what the Judicial Branch may do in enforcing federal law that has been made applicable to create enforceable rights in court. As we explain below, the ICJ order does not alter the essence of the Court's task on the applications for a

stay of execution. Moreover, stays of execution in capital cases are subject in general to the same standards as those governing stays in other cases. There must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the graht of certiorari; there must a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895-896 (1983). In addition, it may be appropriate, as in any stay application, to consider the harm to other parties that would result from the grant of a stay, and the public interest. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Application of those standards leads to the conclusion that a judicial stay of execution is not warranted.

B. As to the merits, we have explained above why respondents' various claims fail; we believe the law is sufficiently clear that a stay would not be warranted. Our view of the merits is not changed by the recent order of the ICJ. The indication of provisional measures by the ICJ does not represent even tentative agreement with the merits of Paraguay's argument to that court that the Vienna Convention provides a remedy of vacatur of a criminal conviction.* The indication of

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* The United States has argued to the ICJ that the application brought by Paraguay does not come within that court's jurisdiction under the Optional Protocol for disputes arising under the Vienna Convention. We have argued that the case does

(continued...)

provisional measures is, therefore, significantly different from a grant of a preliminary injunction or application for a stay familiar to the Court under U.S. law. The ICJ's order notes, in fact, that "the existence of relief sought by Paraguay under the Convention can only be determined at the stage of the merits," 97-8214 Supplemental Brief in Support of Application for a Stay of Execution, Exh. C, ¶ 33, and that "measures indicated by the [ICJ] for a stay of execution would necessarily be provisional in nature and would not in any way prejudge the findings the Court might make on the merits," id. ¶ 40.

C. As to the balance of hardships, there can be no doubt of the irreparable harm to Breard from the carrying out of his sentence of execution; but that irreparable harm, in and of itself, cannot warrant a stay of execution in the absence of a reasonably persuasive showing on the merits (unless every application for a stay of execution were to be granted). And, of course, the State of Virginia would be harmed by an order preventing it from carrying out its lawfully entered judgment of execution in a timely fashion, despite the fact that the sentence complies with constitutional requirements and that the arguments presented in these cases about the Vienna Convention provide no basis for relief.

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[9](...continued)
not involve the "interpretation or application" of the Convention, within the meaning of the Optional Protocol, because it is not disputed that the Convention was violated, and because the Convention does not provide the remedy that Paraguay is seeking.

D. As to the public interest, petitioners contend that this Court should stay the execution, either as a matter of comity or (they argue) because the ICJ's order is binding. Concerning the issue of comity, we emphasize again that the Secretary of State is requesting that the Governor of Virginia stay Breard's execution. There is little prospect, therefore, that the international community will view the United States government's response to the ICJ's order as indicating disrespect to that court's processes.

As to the purportedly binding effect of the ICJ's order, there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding. See Restatement (Third) of Foreign Relations Law of the United States § 903, Reporter's Note 6, at 369-370 (1986). The better reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have "the power to indicate any provisional measures which ought to be taken to preserve the respective rights of either power." Article 41(2) further states that, "[p]ending the final decision [of the ICJ], notice of the measures suggested shall forthwith be given to the parties and the Security Council." The use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (e.g.: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that ICJ provisional measures are not binding on the parties. The distinction in Article 41(2) between the "final decision"

ultimately foreseen and the "measures suggested" in the interim also suggests that the "measures suggested" are not binding.

Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94(1) provides that "[e]ach member * * * undertakes to comply with the decision of the [ICJ] in any case to which it is a party." (Emphasis added.) "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "[i]f any party to a case fails to perform the obligations incumbent upon it by a judgment rendered by the [ICJ], the other party may have recourse to the Security Council." (Emphasis added.) Significantly, the Security Council has never acted to enforce provisional measures indicated by the ICJ. See Restatement, supra, at 368 (discussing Security Council's response to ICJ's order indicating provisional measures in dispute between United Kingdom and Iran).

Moreover, the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent. See Restatement, supra, at 368-369 (discussing Australia and New Zealand v. France, 1975 I.C.J. 99, 106; United States v. Iran, 1979 I.C.J. 20-21; Nicaragua v. United States,

1984 I.C.J. 392, 422, and United Kingdom v. Iran, 1951 I.C.J. 89, 93-94); see also 1972 I.C.J. 17 (indicating provisional measures in United Kingdom v. Iceland). The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order.

Finally, even if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ's order in this case does not require this Court to stop Breard's execution. That order states that the United States "should" take all measures "at its disposal" to ensure that Breard is not executed. The word "should" in the ICJ's order confirms our understanding, described above, that the ICJ order is precatory rather than mandatory. But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion -- such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution -- and not legal compulsion through the judicial system. That is the situation here. Accordingly, the ICJ's order does not provide an independent basis for this Court either to grant certiorari or to stay the execution.

CONCLUSION

The petitions for a writ of certiorari should be denied. The applications for a stay should also be denied.

Respectfully submitted.

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APRIL 1998

U. S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

April 13, 1998

Honorable William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Paraguay v. Gilmore, No. 97-1390;
Breard v. Greene, No. 97-8214

Dear Mr. Suter:

Attached is Appendix F to the Brief for the United States As Amicus Curiae in the above-captioned cases.

Sincerely,

Seth P. Waxman/cs

Seth P. Waxman
Solicitor General

cc: attached service list

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

COMMONWEALTH OF VIRGINIA,

v. **Docket Nos. CR92-1467, 1664-1668**

ANGEL BREARD,

Defendant.

ORDER

Pursuant to Section 53.1-232.1 of the Code of Virginia, having determined that the United States Court of Appeals for the Fourth Circuit has denied habeas corpus relief to the defendant, this Court hereby ORDERS that the death sentence of Angel Breard be carried out on the 14th day of April, 1998, at such a time of day as the Director of the Department of Corrections shall fix.

It is further ORDERED that at least ten (10) days before April 14, 1998, the Director shall cause a copy of this Order to be delivered to the defendant and, if the defendant is unable to read it, cause it to be explained to him. The Director shall make return thereof to the Clerk of this Court.

The Clerk is directed to promptly furnish certified copies of this Order to the following persons:

Ronald J. Angelone, Director
Virginia Department of Corrections
P.O. Box 26963
6900 Atmore Drive
Richmond, Virginia 23261

EXHIBIT
A

The Honorable Richard Trodden
Commonwealth's Attorney
Arlington County
1425 North Courthouse Road
Arlington, Virginia 22201

William G. Broaddus
McGuire, Woods, Battle & Boothe
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030

Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Entered this 25th day of February, 1998.

Pane F. Friedlander
Judge

A COPY
TESTE: DAVID A. BELL, CLERK
BY Beth Davis
DEPUTY CLERK

FILED: March 27, 1998

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 96-25
(CA-96-366-3)

ANGEL FRANCISCO BREARD,

Petitioner - Appellant,

versus

SAMUEL V. PRUETT, Warden, Mecklenburg Correctional Center,

Respondent - Appellee.

THE HUMAN RIGHTS COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION,

Amicus Curiae.

ORDER

Appellant has filed an application to recall mandate and stay execution and appellee has filed a response in opposition.

The Court denies the application to recall mandate and stay execution.

EXHIBIT
B

Entered at the direction of Judge Hamilton, with the concurrence of Judge Williams and Senior Judge Butzner.

For the Court

/s/ Patricia S. Connor

Clerk

Supreme Court, U.S.
FILED
APR 13 1998
CLERK

Nos. 97-1390, 125 Orig.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY *et al.*,
Petitioners and Plaintiffs,

— v. —

JAMES S. GILMORE III, Governor
of the Commonwealth of Virginia, *et al.*,
Respondents and Defendants.
(Additional parties listed inside front cover)

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND ON MOTION
FOR LEAVE TO FILE ORIGINAL COMPLAINT

REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Counsel for Petitioners and Plaintiffs

Dated: April 14, 1998

Additional Parties:

JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,

Petitioners and Plaintiffs,

MARK L. EARLY, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; and DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia,

Respondents and Defendants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-1390, 125 Orig.

THE REPUBLIC OF PARAGUAY and
JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and
JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,
Petitioners and Plaintiffs,

— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, MARK L. EARLY, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; and DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia,
Respondents and Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND ON MOTION
FOR LEAVE TO FILE ORIGINAL COMPLAINT

REPLY TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

As the Solicitor General's brief makes clear, this case is precisely the kind of case that this Court was created to decide. The International Court of Justice has ruled 15-0 that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision" in the proceedings instituted by Paraguay against the United States in that

Court. The United States advises the Court that the Secretary of State has told the Governor of the Commonwealth of Virginia that, in light of the ICJ Order, the "unique and difficult foreign policy issues" raised by the case, and "other problems created by the Court's provisional measures," the execution should be stayed. U.S. Br. at 46 & App. F.

According to the Solicitor General, however, "'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion." U.S. Br. at 51 (quoting ICJ Order; brackets in U.S. Br.). Hence, the Solicitor General advises that the Executive Branch is content to do no more than send the Secretary's letter, and then sit idly by while the Governor — who, the United States advises, turned down an earlier, similar request by the Secretary that could have avoided Paraguay's filing in the ICJ, U.S. Br. at 11 — determines whether he should adhere to the Secretary's new request. The Solicitor General invites the Court similarly to sit on the sidelines by denying Paraguay's requests for relief. Hence, according to the Solicitor General, the Governor of Virginia is now to determine whether the United States will comply with the ICJ Order.

In the face of the conflict in the Executive Branch, and the profound constitutional disorientation that would result if the question of compliance with an ICJ Order were left to the Governor of Virginia, this Court should grant the petition, the motion for leave to file the original complaint, and the accompanying motions for provisional relief, so that it may then decide, with both adequate time and adequate briefing, whether the United States will comply with or disregard the ICJ Order and the United States's obligations under the treaties involved in this case.

This Court plainly has the authority to decide these matters. *First*, the law of foreign relations and international obligations is quintessentially federal. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for foreign relations purposes, federal foreign relations

authority is plenary).[1] *Second*, it is emphatically this Court's job to say what federal law is and to enforce that law against noncomplying state officials. *E.g.*, *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *see also Jones v. Meehan*, 175 U.S. 1, 32 (1899) (interpretation of treaties "the peculiar province of the judiciary"). *Third*, the Framers gave this Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls" and federal courts jurisdiction in "Cases . . . arising under . . . Treaties," U.S. Const., art. III, § 2, specifically in order to prevent disputes such as this one from creating an international incident. Petition, No. 97-1390, at 25-29. *Finally*, as a matter of international law, the judiciary engages the United States' international responsibility as fully as does the executive. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility).

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1. The breadth of federal authority in the area of international relations belies the suggestion by the United States that it is constitutionally incapable of enforcing compliance by state officials with federal law in the form of the United States's international obligations — a proposition also flatly contradicted by the very brief in which the statement is made. U.S. Br. at 15 n.3 (citing *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982), to establish "the ability of the United States to sue in order to enforce compliance with the Vienna Convention"); *see United States v. City of Glen Cove*, 322 F Supp. 149 (E.D.N.Y.), *aff'd on opinion below*, 450 F.2d 884 (2d Cir. 19) (suit by United States to enjoin municipality from assessing taxes on property owned by foreign government); *see also Dames & Moore v. Regan*, 453 U.S. 654 (1981) (affording Executive Branch great latitude in effecting resolution of international dispute); *Asakura v. Seattle*, 265 U.S. 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (enjoining enforcement of state judgment entered in violation of federal law).

Particularly in light of the confusion in the Executive Branch, this Court should exercise its authority to decide both the original case filed by Paraguay and the case here on petition for certiorari. *First*, the Secretary of State's letter makes plain the weighty federal interest threatened by Virginia's noncompliance:

> I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the [Vienna] Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or travelling abroad.

The Secretary's letter echoes the views expressed by Judge Stephen M. Schwebel of the United States, the President of the ICJ, when he wrote in his declaration explaining his vote in favor of the ICJ Order that

> The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States).

In light of these observations, there can be no question of both the national and international importance of the case.

Second, there should be no question that the determination of the United States' compliance or refusal to comply with the ICJ Order

should be decided by a federal authority. The United States "sp[oke] with one voice," *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979), when it undertook the obligations contained in the United Nations Charter, the Statute of the International Court of Justice, the Vienna Convention on Consular Relations, and its Optional Protocol. Equally, it should be an organ of the whole people, not of an individual state, that determines whether the United States will comply. *See United States v. Pink*, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement"); *United States v. Belmont*, 301 U.S. 304, 324, 331 (1937) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states").

Third, the Court's opportunity to make that determination with the attention it deserves should not be sacrificed to the rush to meet an arbitrary execution date set by Virginia some months ago. Paraguay recognizes the right of the Commonwealth of Virginia and other competent authorities of the United States to prosecute and punish crimes within its jurisdiction, including its right to retry Mr. Breard if Paraguay prevails on its claims. Thus, the only interest at stake for Virginia if Paraguay's claims are denied is a delayed execution. By contrast, Paraguay faces the undoubted irreparable harm that an execution would cause, and the United States faces the harm to its status as a supporter of the rule of law in the world community that would result from a decision not even to consider with due deliberation the implications of Paraguay's claims and the possible consequences of disregarding of the ICJ Order.

Finally, separate and apart from the United States' interest generally in upholding the rule of law, the Court should consider the harm that would flow from a peremptory disregard *by this Court* of the ICJ Order. This Court, more than even the Secretary of State or other executive officials, will appreciate the harm to the rule of law, and to respect for judicial authority as the ultimate safeguard of the

rule of law, of a decision by the United States, after agreeing to submit disputes under the Vienna Convention to the International Court of Justice, to refuse to effect compliance with an order of that Court in a case in which the United States has appeared, participated, and had a full opportunity to present its views.

It is critical to the rule of law for which the United States has stood since its founding that the ICJ's order be respected and implemented. Given the role of the United States in promoting the rule of law in the modern world, and the role of this Court in promoting the rule of law in the United States, this Court should give effect to the ICJ Order, whether as a matter of treaty obligation or international comity.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioners' previous submissions in No. 97-1390 and plaintiffs' previous submissions in No. 125 Original, the Court should grant (1) the petition for writ of certiorari; (2) the application and supplemental application for a stay of or injunction against the execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998; (3) the motion for leave to file an original complaint; and (4) the accompanying motion for provisional relief halting the execution.

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